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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
Petitioners,

v.

EUGENE ZUCKERT, SECRETARY OF THE AIR FORCE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 8, 1969

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joseph N. Tooni and Daniel L. Edwards, Jr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cases on December 10, 1968.

CITATIONS TO OPINIONS BELOW

The decisions of the Court below, the Petitions for Rehearing, the District Court Orders and the Orders of the Sixth Circuit Court of Appeals are unreported, but are included in the record and are appended hereto.

JURISDICTION

The judgments of the Court of Appeals were entered October 16, 1968. Petitions for Rehearing were denied

December 10, 1968. An extension of time until May 9, 1969, for filing a Petition for Certiorari was granted by this Court on March 8, 1969. The jurisdiction of this Court is invoked under 28 U.S. Code, § 1254.

QUESTIONS PRESENTED

1. Is agency removal of Federal Civil Service employees subject to meaningful judicial review?

2. Whether constitutional, statutory and procedural rights provided by applicable law and government regulations were provided to Petitioners.

3. Did material issues of fact prevent Summary Judgment against Petitioners?

(a) Tooni contends that purported removal for intentional false statements and omission of an arrest contained genuine issues of material facts.

(b) Edwards contends he was rated efficient in May 1961, but was later alleged to be inefficient in watching Bob Hope movies, creating genuine issues of material facts.

4. Was the Veterans Preference law violated?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of Constitution of United States (emphasis supplied):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Veterans Preference Act of 1944, as amended, § 863, now 5 U. S. Code § 7512:

"Sec. 863. *DISCHARGE, SUSPENSION, ETC., ONLY FOR CAUSE: REASON IN WRITING: ADVANCE NOTICE: PERSONAL APPEARANCE: FINDINGS AND RECOMMENDATIONS*

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, heretofore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointments except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: PROVIDED, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same

to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: PROVIDED FURTHER, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title."

REGULATIONS: The pertinent text of the following regulations are set forth in the Appendix:

Air Force Manual 40-1 (AF A-1, Sec. 5) dated 31 December 1961
Air Force Manual 40-1 (AF A-12.5) dated 31 December 1961
Air Material Command Manual 40-2 (AMCM 40-2) dated 29 July 1959
DAAFDM 40-1 Dated 1 September 1961

STATEMENT OF THE CASES

These cases involve identical or closely related questions. In each case the District Court had jurisdiction under Title 28, United States Code § 1361, giving the district courts jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Petitioners.

The facts underlying each employee's removal are necessarily different, however, and accordingly the basic facts of the two cases are set out separately.

JOSEPH N. TOONI CASE

The Petitioner, Joseph N. Tooni, was born in Iraq. He is a naturalized citizen of the United States.

He entered the Federal Service on July 16, 1947; he was a Captain in the United States Army Quartermaster Corps, as a Petroleum Engineer, in charge of oil distribution in Okinawa, during Korea, 1951-1954 (subsequently honor-

ably discharged as a Major); he was a Development Engineer for Aero-Jet General Corporation, Sacramento, California, from March, 1956 to September, 1957; Chemical Engineer for American Independent Oil Company from 1957 to 1958; Ordinance Engineer, GS-9 from March, 1958 to September, 1958, at the U. S. Naval Propellant Plant, Indian Head, Maryland, and finally a GS-11, Chemical Engineer, at the same location, from September, 1958 to January, 1960.

The items complained of on his Form 57 relate as far back as 1934 when Mr. Tooni was at Hope College. Mr. Tooni's Affidavit in regard to each item of alleged misrepresentation is attached. (App. 1a)

Mr. Tooni was originally employed by the Government in July, 1947, as a GS-5 Chemist for the Navy Department, receiving additional promotions and transfers to GS-7 for the Army Materiel Inspector; to GS-9, Reserve Chemist—Army Ordnance; then after experience as a civilian with Aero-Jet General, to Chemical Engineer for American Oil Co., then GS-9, Ordnance Engineer (same grade as on previous separation); then GS-11, Chemical Engineer, Navy. After a year of satisfactory service, the Navy automatically rated him a GS-12. He was rated a GS-12 by the Navy *BEFORE* he came to Dayton for interview; subsequently he was employed by the Air Force Department based upon the Civil Service and Navy rating of GS-12, which rating was based upon satisfactory service as a GS-11, from September, 1958 to January, 1960.

After an additional 2½ years he was re-classified by the Air Force Depot as a Mechanical Engineer because of *experience* on the job; that subsequently a *mass transfer* placed him with AFLC (Air Force Logistics Command), Wright-Patterson Air Force Base, at the same grade level and job title, GS-12, Mechanical Engineer, that no promotion of any nature occurred; on February 7, 1964, he

received the Notice of Proposed Removal effective April 3, 1964, for *various* previous alleged falsifications on his employment applications dating back to 1958, and for one previous offense.

Another item is necessary for a complete and thorough appraisal of this case. This whole case started when Mr. Tooni was implicated in a separate matter and an investigation was requested about February 15, 1962, while he was employed at the Gentile Depot at Dayton, Ohio. [See Para. 7 Notice of Proposed Removal Letter. App. 9a]. Mr. Tooni was cleared of having anything to do with that matter under investigation, but in the course of the investigation it was learned that Mr. Tooni had not attended California State College, as stated on his Form 57.

Upon investigation it was determined, however, that he did attend the University of California Extension School, in Sacramento, California, in which the facilities of Sacramento State College were utilized.

Further investigation revealed that certain courses were non-credit courses, but Tooni never claimed them to be credit courses in the first place.

From this inadvertent investigation, we now find a long time Federal employee being removed for fraudulent Forms 57 of 1958, 1959, 1960, and 1961. We have this situation, despite the fact that Mr. Tooni had been with the Air Force as a GS-12 since January, 1960, over two years prior to this investigation on a separate matter.

This background puts this entire case into perspective, and helps to explain why Petitioner contends that the Chicago Region was correct in finding that there was no intentional mis-stating of material information.

Mr. Tooni appealed his removal to the Civil Service Commission in Chicago, stating that the removal action does not meet the criteria of the regulations for removal from the Federal Service nor to promote the efficiency of the

service and the United States Civil Service Commission, Chicago Regional Director, so found on June 2, 1964, reversing the agency action of removal.

On further appeal by the Agency, the Board of Appeals and Review, United States Civil Service Commission, on August 28, 1964, reversed the Chicago Regional Director.

Petitioner contends that said Board of Appeals and Review acted in an arbitrary and capricious manner and abused its discretion for the reason that the representations on Petitioner's Form 57 were old and not material to Petitioner's employment by the Air Force. Further, said Board of Appeals and Review failed to determine any materiality to the adverse action in question. Petitioner contends that his then current position with the Air Force was obtained solely on the basis of his past experience, and accordingly any representation as to educational accomplishments were not relevant to any promotion or even his retention in his then current assignment.

The United States Civil Service Commission, on October 30, 1964, refused to reopen the Appeal, and accordingly Petitioner's administrative rights have been exhausted.

Petitioner filed his complaint in the United States District Court at Dayton, Ohio, and after the case was at issue, Cross-Motions for Summary Judgment were filed.

Subsequently, the District Court decided on July 3, 1967 that this case was controlled by the Sixth Circuit decision in *Fass* v. *Ruegg*, 379 F. 2d 216 and sustained the Government's motion. The Sixth Circuit affirmed on October 16, 1968.

DANIEL L. EDWARDS CASE

The Petitioner Daniel L. Edwards, Jr., entered the federal service 14 July 1942, as a Civil Service employee, served in the military service from March 1943 to March 1946, and had over 19 years total federal service at the time of the removal hereinafter referred to.

Mr. Edwards was a Missile Inspection Specialist, GS-12, top-step. During the spring and summer of 1961 he became concerned with the lack of assignment of work for him to perform. He grew tired of watching movies for lack of work assigned, and in June 1961, he requested a Job Audit. On or about 13 September 1961, the Chief Classification and Wage Administrative Branch reviewed Petitioner's job description and informed Mr. Edwards officially by memo that his job would be re-audited in November 1961.

Subsequently, Petitioner was given interim duty tasks, many menial in nature, little information and generally was given insufficient facts and reports, denied access to readily available military and technical information necessary to perform the interim tasks assigned pending the forthcoming November 1961, re-audit; and generally Petioner was hindered and obstructed in his efforts to perform the tasks assigned.

On 17 October 1961, a meeting was held which began an avalanche of requests by Petitioner for protection of his job rights, all of which were repeatedly ignored by the Air Force. A few days after the October meeting, Mr. Edwards was asked to initial a purported summary of the 17 October meeting. Mr. Edwards did not agree with the summary and advised Management accordingly. Mr. Edwards initialed the summary to show that he had seen it and promptly requested an investigation by the Department of Inspector General. The Inspector General's office stated by letter dated 14 November 1961 that Petitioner's request should be handled as a request for a grievance hear-

ing. In the meantime, Mr. Edwards had already asked for a grievance hearing on 18 October 1961 and on 2 November 1961.

As stated, these requests for a hearing were ignored and finally Mr. Edwards suffered a heart attack and was placed on sick leave.

While at home recuperating from his illness, the Petitioner received a "Notice of Proposed Removal" dated 15 February 1962. In the meantime, Petitioner had again requested a grievance hearing by letter to the Commander of the 2907th Air Base Group dated 25 January 1962. It is uncontroverted that the "Notice of Proposed Removal" contained erroneous advice to the employee in regard to which civil service regulations would govern the action for removal.

Petitioner did not return to work until 2 April 1962, at which time he again requested a hearing and also the opportunity to answer orally under the Veterans Preference Law. He was told to answer in writing and was denied an oral hearing. Subsequently, only a few days before the effective date of removal he was then asked if he wanted an oral hearing, but was still not given the correct advice as to applicable Civil Service Regulations until he was handed a "corrected Notice of Proposed Removal" on the very day of the effective date of the Proposed Removal. This "Corrected Notice" extended the effective date of separation to 23 April 1962.

Petitioner again requested a grievance hearing on 17 April 1962 and was finally given a hearing on 16 May 1962.

Petitioner complains that the Chairman of the Hearing Committee was selected from a wrong Civilian Personnel Office, the Chairman of the Hearing Committee conducted pre-hearing interviews contrary to Air Force Regulations, that the Committee Chairman failed to follow regulations in regard to notifying witnesses and having them available,

and that the decision of the Grievance Committee and notification to the employee were not in accordance with Air Force Regulations.

Petitioner continued to seek administrative review until 4 May 1964 when the Department of the Air Force refused additional review.

Petitioner filed his Complaint in the United States District Court on 11 June 1964, claiming irregularities in the removal procedure which resulted in his separation from the federal service on 23 April 1962.

Subsequently, the District Court decided on 3 July 1967 that this case was controlled by the Sixth Circuit decision in *Fass* v. *Ruegg*, 379 F. 2d 216 and sustained the Government's motion. The Sixth Circuit affirmed on October 16, 1968.

REASONS FOR GRANTING THE WRIT

QUESTION 1.

IS AGENCY REMOVAL OF FEDERAL CIVIL SERVICE EMPLOYEES SUBJECT TO MEANINGFUL JUDICIAL REVIEW?

Each Petitioner has his specific reasons for bringing his case to this Court. Common to both Petitioners, however, is the fact that neither has had a review of his case that has meant any relief to Petitioners. Petitioners do not just shout "sour grapes", but are concerned that they have not been given their day in Court; that if the present decisions stand that all federal employees similarly situated will likewise fall flat on their faces when seeking judicial review.

Why do these Petitioners feel so strong that they are right and the Respondent wrong? Simply because the facts and law COMPEL A REVERSAL OF THE COURTS BELOW.

What has happened so far in Petitioners' fight for what is right, fair, just, and legal is that the District Judge felt he did not have the authority to review and grant relief. District Judge Weinman indicated at the close of oral arguments that he believed the employees deserved consideration—"I'll have to see if I can do anything." The District Judge felt compelled, however, to follow *Fass* v. *Ruegg*, 379 F.2d 216 (CCA, 6th 1968). In short, Petitioners were denied a fair judicial review based upon an apparent growing trend in the federal law that the decisions of administrative bodies (Civil Service Commission, Secretary of the Air Force) are not subject to judicial review except for arbitrary and capricious action.

Actually, the rule began with the theory that a reviewing Court should not have to substitute its opinion for the wisdom or good judgment of the agency in exercising dis-

cretion. *Baum* v. *Zuckert*, 342 F.2d 145, (CCA, 6th 1965) and citations therein.

The problem is: When do the Courts review and substitute the Court's judgment for that of the administrative body? Effective review and reversal of error by administrative bodies has been done, and recently. *Louks* v. *United States*, 395 F.2d 993 (Ct. Claims 1968); *Scott* v. *Macy*, 349 F.2d 182 (CCA, D.C. 1965).

Petitioners contend strenuously that their cases are stronger than either *Louks* or *Scott*, and bear little resemblance to *Baum* or *Fass*.

Are Petitioners to be penalized because they brought their cases in the Sixth Circuit rather than the District of Columbia?

Further, both Petitioners are Veterans. The Veterans Preference Act prohibits discharge of Petitioners except "for such cause as will promote the efficiency of the service."

How can one reconcile the review afforded in the *Scott* case which involved *an application for employment* as opposed to long time federal career employment by Petitioners? In *Scott*, a person alleged to be a homosexual was granted judicial review reversing the administrative body. Was this not the Court of Appeals for the District of Columbia substituting its judgment for that of the Civil Service Commission?

Petitioners do not find fault with *Scott*; but find it difficult to swallow when Petitioners have years of satisfactory service, both military and civilian; and now they cannot obtain justice in their cases.

A person's business, occupation, or calling is "property" within the meaning of the constitutional provisions as to due process of law, and is included in the right to liberty and the pursuit of happiness. 11 *Amer. Jur.* 1148.

There is no question but what the Bill of Rights of the Constitutions of Ohio and of the United States protects an

individual's right to work and to follow a chosen trade or occupation.

In the case of *Seligman* v. *The Toledo Motion Pictures*, 88 Ohio App. 137 (1947), the Court stated in the fourth syllabus:

> "The right to labor, to follow a chosen trade or occupation, and to earn a livelihood for oneself and those dependent on him, is a property right within the benign protection of the bill of rights of the Ohio Constitution, and of the Constitution of the United States, and the invasion of that right is a legal wrong for which the law provides a remedy.
>
> "In the instant case, the action taken by the local union, depriving plaintiff of his right to work and have employment in the field where he is trained and learned through years of labor, is arbitrary, unreasonable, violative of plaintiff's constitutional rights and contrary to public policy."

At this point, Petitioners will state separately their reasons why each believes his case should and must be reversed.

JOSEPH N. TOONI (SEPARATE ARGUMENT)

QUESTION 2.

WHETHER CONSTITUTIONAL, STATUTORY AND PROCEDURAL RIGHTS PROVIDED BY APPLICABLE LAW AND GOVERNMENT REGULATIONS WERE PROVIDED TO PETITIONER:

Petitioner Tooni's removal is based on alleged false misrepresentations on his Application for Employment, Form 57. As the Chicago Region of the Civil Service Commission found; never, even in the Letter of Proposed Removal, was Petitioner Tooni accused of intentional false statements. The Chicago Region decision stated:

> "The Agency has made no allegation or showing that the falsifications with respect to Appellant's educational background in any way affected his qualifications, competency, or ability to perform his job, or that they were otherwise material."
>
> "Upon consideration of the *entire record* it is found that the removal action does not meet the criterion of the regulations that the action be taken in order to promote efficiency of the Service."

One must remember that Petitioner Tooni is a native of Iraq. When he said he attended a course at the Sacramento State College and it turned out to be the University of California at Sacramento, does this even sound like fraud?

Procedural error exists in that Petitioner's so called additions to his Form 57 were never screened and accepted in any formal manner by the government, as required by regulation. The various supplemental sheets were never offered by Petitioner as anything other than general information. Actual educational credits are screened and *accepted* by an interviewing officer of the government. This was never done in this case.

In any event, the Form 57 attachments which have been attacked in this case were made out in *1958, two years* prior to the application for transfer to the Air Force. This does not make a case of intentional falsification.

Mr. Tooni is a naturalized citizen who has served his new country in both military and civilian capacities. He even had had an admonishment growing out of an argument arising out of a supervisor who questioned his loyalty. Now this admonishment is being used as one of the basis for his removal.

It is inconceivable that a veteran of World War II and Korea and over fifteen years federal service can be removed from his job and income for alleged falsifications having absolutely no showing of intent and materiality.

The letter of Proposed Removal contains no allegation of intention nor deliberate falsification, nor does it contain any motivation. The importance of this was mentioned in the decision of the Chicago Region, and the Agency never has established materiality nor intent. The Air Force did attempt to remedy this procedural error after the decision of the Chicago Regional Office, in a letter dated June 10, 1964, Air Force Logistics Command, to the Board of Appeals and Review. In this letter the Air Force, for the first time, attempted to justify materiality and intent, even though the items were not a part of the Notice of Proposed Removal. And even to this date, the Air Force has not produced evidence of intent and/or materiality. In any event, the Notice of Proposed Removal failed to set forth the required allegations of the regulations, and therefore Mr. Tooni's removal is illegal and contrary to law and the rules and regulations of the Civil Service Commission and the United States Air Force.

Removals which assume facts which do not exist, or are not adequately supported by evidence, do not promote the efficiency of the service.

In addition to the alleged false statements, Tooni was cited for failure to list an arrest on his Form 57. This is a real question of fact and is on all fours with *Weinberg* v. *Macy*, 360 F.2d 816 (CA, D.C. 1965), wherein the employee did not realize he was actually arrested. The arrest that the agency claims was omitted by Mr. Tooni involved his looking for the Racquet Club which was located in suburban Kettering South of Dayton. One evening, while Petitioner was on South Ludlow Street in downtown Dayton, Mr. Tooni asked a policeman for directions to the Racquet Club, but with his accent, Racquet sounded liked "Roc-ket." The policeman was busy rounding up some drunks from the Rocket Bar on South Ludlow Street and said to Petitioner, "You are already there."

Petitioner Tooni, not realizing he was in front of the Rocket Bar, inquired again, where is the Racquet (Roc-Ket) Club. The Dayton policeman, rather perturbed by now, said "You are at the Rocket Bar now, and you had just better get into this wagon with the rest of these fellows."

Before he knew it, Tooni was driven to the Police Station, and booked for drunk. At that time Petitioner was able to convince the Desk Sergeant that he was not drunk, that the whole thing was a mistake, and that he was just trying to get to the Racquet Club.

The Desk Sergeant informed Tooni that he was supposed to hold "drunks" for six hours or so, but that if he wanted to give him ten dollars, he could leave, which Tooni did.

This is the arrest which Tooni is charged with omitting from his Form 57! There is a serious question of fact as to whether Mr. Tooni even knew or realized he was actually "arrested."

Petitioner Tooni stated in an Affidavit given in rebuttal to the Letter of Proposed Removal:

> "Affiant states that with reference to the charge of falsifying item number 33 through the omission of required information relating to arrests, he was driving and he stopped to ask a police officer for directions to the Racquet Club and this was in front of the Rocket Bar to which he had already been directed; that the officer assumed he was drunk because he was otherwise occupied and affiant had to ask the officer the same question 2 or 3 times; that the officer may have felt affiant did not know affiant was already where it seemed he wanted to be. (Officer misunderstood "Racquet" for "Rocket"). The officer was putting youngsters who were in the Rocket Club into the police wagon, and was probably irritated and the officer told affiant to get in the wagon also; that at the police station, affiant was told to pay Ten Dollars ($10.00)

> and told it would be forgotten about; affiant understood there would be no record made of the incident; affiant then went back to his car and drove to the Racquet Club. Affiant was not drunk; that the entire incident took less than two (2) hours including a fifteen (15) minute walk back to his car. Affiant did mention his arrest in Upper Marlboro, Maryland, and he would have mentioned the Dayton, Ohio incident if he had felt it was really recorded as an arrest."

Petitioner Tooni's Affidavits given to the Civil Service Commission and in support of his Motion for Summary Judgment (reserving his right to a trial of material facts) clearly placed the burden of proving all aspects of the Government's case on the agency. See the first two syllabi of the *Weinberg* case:

> "1. A genuine issue of material fact existed as to whether civil service employee, discharged on ground he made an intentional false statement in application for federal employment, knew or should have known that state court proceedings in which he was involved, inaccurately described by government as bastardy proceedings, involved an arrest, charge or holding for violation of the law, precluding summary judgment in declaratory action relating to discharge.
>
> 2. From beginning burden was on government, in discharge proceedings based upon intentional false statements in application for federal employment, to establish intentional falsification."

The conclusion is clear. No intent. No materiality. No fraud. Intent is a question of fact, and the government has not shown this fact, especially by summary judgment.

Justice demands that Petitioner be restored to his government job.

DANIEL L. EDWARDS, JR.,
(SEPARATE ARGUMENT)

Petitioner Edwards' removal is based upon alleged inefficiency after 19 years of satisfactory service with the Federal government. The period of alleged inefficiency was from 17 October 1961 to 15 February 1962.

In May 1961, Petitioner Edwards received a satisfactory efficiency rating. Subsequently, as referred to in the Statement of Facts in the Daniel L. Edwards case, Petitioner became involved in a series of happenings that started with the Petitioner not having work to do, and ended with the Petitioner being removed from the Federal service, despite numerous procedural violations by the Air Force. There is no question but that Petitioner was subjected to harassment during the crucial period from October to February. Petitioner was denied his pay, given an illegal one (1) day suspension, which was corrected only by the Petitioner appealing to the Inspector General and to the Comptroller General of the United States. (See letter AFLC, W-P AFB, Ohio dated 13 Dec. 1962.) (App. 35a).

Management claimed Petitioner was not performing satisfactorily and illegally AWOL. Petitioner was entitled to time away from his work duties to carry on his official complaints regarding the improper charge of AWOL and suspension of pay. Management, displeased with Petitioner's success, denied information and data to Petitioner to deter his accomplishment of the work tasks assigned to him, and carried on their vendetta against Petitioner by giving him the Notice of Proposed Removal while Petitioner was home recuperating with a heart attack. A vendetta that began when the Petitioner refused to give to the Colonel's church and Petitioner's request for a job audit which brought unwanted attention upon Petitioner's superiors.

In other words, in the short period of time from 17 October, until Petitioner went on sick leave, February 12, 1962, and while Petitioner spent many hours disproving unfounded charges of AWOL, and was frustrated by lack of material and information with which to work, (not to mention the holidays involved—Veterans Day, Thanksgiving, Christmas and New Year), Petitioner was supposed to have become inefficient.

As evidence of Petitioner's continuing his successful fight at the time, see letter dated 23 January 1962, (App. 37a).

During this same period of time, Management and Personnel were violating their own regulations right and left, by refusing a Grievance Hearing to Petitioner in accordance with regulations.

QUESTION 2.

WHETHER CONSTITUTIONAL, STATUTORY AND PROCEDURAL RIGHTS PROVIDED BY APPLICABLE LAW AND GOVERNMENT REGULATIONS WERE PROVIDED TO PETITIONER.

Did the refusal to give employee a timely Grievance Hearing and timely opportunity to answer orally violate Air Force Regulations and the Veterans Preference Law?

It is clear that a Veterans Preference Eligible is entitled to answer charges against him personally and in writing. Veterans Preference Act § 14, 5 U.S.C.A. § 7512. The case of *Paterson* v. *U. S.*, 319 F. 2d 882 (Ct. Cl., 1963), wherein the Court stated the reasoning behind the right of answering personally:

> "In employment relations particularly, mitigating circumstances, often of a highly personal nature, may save a job for a person who, but for these circumstances, would and should be discharged. Whether,

> if the plaintiff had been permitted to make this kind of a personal appeal to his superior, it would have saved his job, we do not know. But when Congress gave to the veteran the right to appear personally, it must have intended to give him the chance of succeeding in such an appeal. The naked facts, without the personal appeal, could be just as well stated in writing. And Congress knew, as we all know, that bureaucratic superiors, like other human beings, are susceptible to the effect of personal appeals."

In addition to the Veterans Preference Act, applicable regulations designed to provide grievance hearings were violated from October 1961 to April 1962. The applicable DESC regulations include the following:

> "If the grievance cannot be resolved informally, the supervisor to whom the grievance is presented in writing, will initiate action within 10 working days to obtain pertinent facts; afford opportunity to persons complained against to make a written reply; render a devision, and notify the employee in writing of his decisions and reasons. *If the decision is not acceptable to the employee, he will be informed that he may present his grievance in writing, through the remaining supervisory levels, to the Commander.*
>
> If the employee requests a hearing, the statement of grievance will be sent to the Civilian Personnel Officer who will insure that an impartial grievance committee is convened within 10 working days of the date of receipt of the request to hear the grievance. If the statement does not contain a specific request for a grievance hearing the employee will be contacted orally to determine whether he desires a hearing. This information will be recorded with the statement of grievance and forwarded to the Installation Commander."

Since DESC was organized in July 1962, superceding Dayton Air Force Depot, the DAFD regulations would

be applicable to the petitioner's discharge. Again, patent non-compliance is evident because petitioner's requests for a grievance hearing began at least as early as 18 October 1961 (to Inspector General), 2 November 1961 (Grievance Request to Commander, Dayton Air Force Depot), 17 April 1962 (Grievance Request to Civilian Personnel Officer, Heath (with copy to Dayton Air Force Depot.) No grievance hearing was convened until 16 May 1962. No reasons for delay were communicated to the employee. This violation (repeated violations) are inexcusable and contrary to the above quoted regulations. And regulations are an important interpretation and become part of the statutory law. See AFM 40-1, A-12.5 dated 31 December 1961, Page 23, which provides as follows:

> ". . . In view of decisions of the United States Supreme Court which have emphasized the importance of adherence to procedural requirements when taking adverse personnel actions, the Commander will assure, when making his decision, that there has been compliance with applicable procedures whether externally imposed or established by the Air Force at any level. If unusual circumstances cause a delay, the employee will be notified of the reasons in writing."

To compound this departure from required procedure, the employee was notified about September 12, 1962, of the decision of the Grievance Committee instead of within ten (10) working days as required by regulations. Neither the Committee nor the Commander complied with the time stipulations required by regulation DAAFDM 40-1, par. 7, which provides as follows:

> "Within 10 working days after completion of the hearing, the Committee or the CPO, if no hearing was held (paragraph 6f) will prepare a complete record of the grievance to the Commander. The Commander

will consider the findings and recommendations of the Committee or CPO; make a decision, and give written notice of the decision to the employee within 10 working days of the date on which the recommendations were received."

Recapping, these dates appear as follows:

		DATE OF REQUIRED ACTION	ACTUAL ACTION
18 Oct. 1961	1st Grievance Request	1 Nov. 1961	None
2 Nov. 1961	2nd Grievance Request	16 Nov 1961	None
25 Jan. 1962	3rd Grievance Request	8 Feb. 1962	None
17 Apr. 1962	4th Grievance Request	1 May 1962	16 May 1962
Decision of Grievance Committee		3 June 1962	12 Aug. 1962
Notification to Employee		13 June 1962	12 Sep. 1962

Petitioner contends strongly that his statutory right to answer personally must be made available to him timely and when it is meaningful; that his numerous requests for a grievance hearing were, in effect, requests to answer personally, and that had he been given the right to confront his superiors personally as contended by the statute and as provided for in the applicable regulations, that he would have been able to defend himself against the trumped up charges of inefficiency.

Of course, the denial of request for grievance hearings, in and of itself, violates the procedural requirements set forth by Air Force Regulations, just as in the case of *Camero* v. *U. S.*, 375 F. 2d 777 (Ct. Cl. 1967).

Incidentally, there is no question but that the meeting of 17 October 1961, is interrelated to the removal action. This is substantiated by the letter of proposed removal dated 15 February 1962 wherein the 17 October 1961 meeting was mentioned at least seven (7) times, and, the tasks which are used as the basis for the removal are the same tasks assigned as "interim" tasks in the 17 October meeting.

Whether or not Petitioner was ever given a proper 30 day notice, is another question, which will now be discussed.

Was the required Notice of Proposed Removal procedurally correct when it was received by employee while on sick leave and when the Notice contained incorrect advice to the employee?

DENIAL OF 30-DAY NOTICE OF PROPOSED REMOVAL

Appellant contends that the receipt of the letter of proposed removal by him at home while on sick leave and his return to duty on or about 2 April 1962 does not constitute the 30-day notice required by law and regulation prior to his separation on 23 April 1962. This allegation is necessarily related to the following denial of statutory right regarding a retroactive amendment to the notice of proposed removal. Taken separately, one might question the denial of a statutory right when an employee receives a notice while at home on sick leave, but considered in conjunction with the fact that he did not return to work until a time less than 30 days of the actual time of his termination of employment, we find that we have a different set of circumstances. The sick leave alone, is one thing, and coupled with the lack of 30 working days back to work, adds to the denial of this statutory right. It is not contended that Petitioner was off work for any reason adverse to the government, and therefore it is normally contemplated that the employee remains on the job during the 30-day period. This inherently provides the employee with access to applicable regulations generally available at the place of employment. See Air Material Command Supervisor's Manual, AMCM, 40-2, Page 14, dated 29 July 1959, which provides in part as follows:

"17. STATUS OF EMPLOYEE DURING NOTICE PERIOD:

a. Normally, the employee will be retained in his position in a work status during the notice period of a pending suspension, removal, or separation action.

b. The immediate supervisor, through the appropriate operating official, may request that the employee be withdrawn from his position and/or the work area for the period if there is valid reason to believe his presence:

> May result in damage to Government property. May be detrimental to the interests of the Government. May be injurious to the employee, his fellow workers, or the general public.

c. When it is necessary to place the employee in another position during the notice period, an appropriate written request, stating the reason why the action is necessary, will be forwarded to the Civilian Personnel Office for consideration. On the basis of reasons given and applicable procedural requirements, a determination will be made as to the exact status of the employee during the notice period."

If the notice of proposed removal in the instant case was in all respects accurate, the Court would have before it the sole question of whether or not an employee on sick leave must have at least 30 days of work after returning from sick leave, before the effective date of the separation. However, in the instant case, we have these facts combined with an erroneous notice, which will now be discussed.

NOTICE OF PROPOSED REMOVAL QUOTED ERRONEOUS REGULATIONS

It is admitted that the last sentence of the letter of proposed removal dated 15 February 1962 is erroneous in that Section 102 (a) (1) of Section 9 of the Civil Service Regulations would govern the action. This was admittedly incorrect, yet this employee at home until 2 April 1962, was given a corrected Notice of Proposed Removal on the very day of the effective date: 20 April 1962. See the retroactive decision to Remove, letter of Col. Lawton dated 20 April 1962. (App. 25a.) Taken alone, this would appear

to be a patent violation of the Veterans Preference Law. The Veterans Preference Law contemplates a correct Notice of Proposed Removal being in the veteran's hands at least 30 days prior to the effective date of the removal. This was obviously not complied with in this case. In fact, on the very day of proposed effective termination, the original 15 February letter was changed in a material respect, thus denying this veteran the statutory rights afforded him by the Veterans Preference Law.

This Section 14 of the Veterans Preference Law is mandatory as set forth in *Stringer* v. *United States*, 117 Ct. Cl. 30. See page 50 of this decision wherein the Court discussed a 29 day notice as being insufficient to comply with a 30 day requirement. Among other things the Court stated:

> "Although it informed plaintiff that he might appeal under existing War Department regulations, it did not inform him of his right, under Section 14, to answer personally and in writing and to furnish affidavits in support of his answer."
>
> ". . . There is no indication that any fresh consideration was given to the matter of plaintiff's demotion following his protests."

It would be hard to imagine a case more parallel and on all four as the Stringer case is to this case. Just as in the Stringer case, Petitioner's repeated requests for a grievance hearing or in some other manner to answer personally were always denied or ignored by the Air Force. The Stringer case emphasized that the employee's rights cannot be so ignored.

Was a non-voting Chairman selected from the proper Civilian Personnel Office, as required by Air Force Manual 40-1, Chapter AF, A-1, Sec. 5?

Air Force Regulations provide that a non-voting Chairman should be selected from the Civilian Personnel Office.

See AFM 40-1, Chapter AF, A-1, Sec. 5, which provides in part:

> ". . . a non-voting chairman generally will be selected from among the best qualified members of the servicing civilian personnel office. In the event a key member of the civilian personnel office is directly involved in the grievance, e.g., he is the person against whom the complaint was lodged, or will appear as a witness, the chairman may be selected from outside of the installation civilian personnel office."

Mr. Bradshaw, the appointed chairman was working for Col. Lawton, the supervising management. There is no question but that the branch in which Petitioner was employed was being serviced by DESC (Defense Electronic Supply Center.) See SF 50 (Standard Form 50), Notification of Personnel Action, signed by Brad Robbins, DESC. (App. 30a) Note Item No. 32 entitled "Office Maintaining Personnel Folder": DESC, but see the Order (Special Order M-104) dated 14 May 1962, appointing the grievance committee, including Mr. Bradshaw, with his office designation: MAHRA. (App. 32a) Note that this office symbol is identical to that of the complaining management, Col. Lawton. See letter of Col. Lawton dated 20 April 1962 with his office symbol being MAHQI. (App. 33a) These symbols mean Middletown Air Materiel, Heath Annex. Col. Lawton was the "Director of Heath Operations" as shown by his signature block beneath his name. The symbol shown on the Order appointing the members of the Committee above referred to, show that Mr. Bradshaw was a member of the same Heath Branch, under the direct supervision of Col. Lawton. As stated above, the regulations which implement the statutes regarding Civil Service employees require the Chairman to be from the servicing Civilian Personnel Office. In the instant case, that office was DESC, under the supervision of Brad Robbins (not Col. Lawton).

It is clear, therefore, that the District Court erred in failing to answer this issue, which constitutes another procedural violation.

Did the Chairman of the Hearing Committee conduct pre-hearing interviews contrary to AFM 40-1, and AFA 12.5?

Mr. Bradshaw conducted pre-hearing meetings specifically contrary to Regulation 40-1 and AFA 12.5. There seems to be no contention but that Mr. Bradshaw did conduct pre-hearing meetings. In the face of sub-section 5.3 F, quoted below, this would appear to be a patent violation of statutory rights:

> "f. The civilian personnel officer will furnish advisory service to all persons concerned in preparing for a hearing. He will designate the *member(s) of his staff, other than the chairman of the committee*, to conduct pre-hearing interviews with the aggrieved employee or his representative and the operating official or his representative." (Emphasis supplied)

The Committee chairman runs the hearings. He passes upon evidence and other matters of procedure and generally is a strong force in the evidence adduced at the hearing. It is absolutely essential that the chairman be unbiased and not a member of the management team which has brought the charges in the first instance.

Did the Committee Chairman follow regulations in regard to notifying witnesses to be available for cross-examination?

There is no question but that the right to have witnesses notified in advance and have them available for cross-examination is a valuable right of which this Petitioner was deprived. See *Williams* v. *Zuckert*, 372 U.S. 765.

As evidence that this was not complied with is the statement on Page 19 of the Transcript, wherein the Chairman admits that he did not inform the witnesses in writing:

> ". . . The point is that before I could officially deliver my letters to the witnesses and to their supervisors, I had to ascertain that their testimony was relevant to the case."

Air Force Manual 40-1, Page 20, Par. 3b provides as follows:

> "When the committee chairman requests and Air Force employee to appear as a witness at the hearing, the request will be in writing and sent direct to the employee with a copy to the employee's supervisor. The employee will be advised that it is his duty to testify, that the testimony of witnesses given freely and honestly is basic to a fair and equitable decision and that his appearance as a witness will be free from any form of interference, criticism, or reprisal on the part of the management."

Petitioner contends that any one of the procedural violations mentioned provide sufficient grounds for reversal of the lower Court. Certainly, taken together, there can be no question but that Petitioner's constitutional, statutory and procedural rights were violated.

In the case of *Vitorelli* v. *Seaton*, 359 U.S. 535, the Court ordered reinstatement for procedural violations when the employee was a temporary non-veteran employee. Of special note is the fact that a revised "Notification of Personal Action" was held not to remedy a prior erroneous notification. Certainly, this applies to the purported revision of Petitioner's "Notice of Proposed Removal" on the effective date of removal. And, if this is not enough to deny Petitioner his statutory and procedural rights, again, certainly the combination of procedural violations require Petitioner

to be reinstated. For example, can a revised "Notice of Proposed Removal," changing the applicable regulations under which the employee was being removed, afford the mandatory 30-day notice to a Veteran Preference Eligible who was removed on 23 April 1962 after receiving the Revised Notice on 20 April 1962?

As stated in *Camero* v. *U.S.*, 375 F 2d 777 (Ct. Cl. 1967):

> "Failure by the Agency to observe these procedures or the standards of fairness, implicit therein makes the attempted unfavorable resolution of an employee's grievance abortive and of no effect."

QUESTION 3.

DID MATERIAL ISSUES OF FACT PREVENT SUMMARY JUDGMENT AGAINST PETITIONERS?

It is apparent from the foregoing discussion of the Tooni and Edwards cases that there are many genuine issues of material fact in each case.

Tooni contends that purported removal for intentional false statements and omission of an arrest contained genuine issues of material facts.

In the Tooni case, the questions of fraudulent intent, the many factual issues regarding whether or not the employee intended to list "credit courses", or just hours attended, whether the college courses listings were material, whether or not the alleged misrepresentations were cured by an Amendment of January 1962, whether the omission of the arrest in Dayton, Ohio, was an arrest that the employee knew or should have known to be an arrest, that had to be listed on his Form-57—all of these factual issues preclude a Summary Judgment in favor of the Government. *Weinberg* v. *Macy*, supra.

Edwards contends he was rated efficient in May 1961, but was later alleged to be inefficient in watching Bob Hope movies, creating genuine issues of material facts.

In the Edwards case, there are factual questions such as whether or not the Petitioner was the object of a personal vendetta by Management to oust a 19 year employee for religious or other personal reasons, whether or not the employee was prevented from being efficient by management harassment and time consuming defense of erroneous charges during a brief period shortened further by sick leave and holidays, whether or not the Grievance Committee Chairman was or should have been disqualified, whether or not the Petitioner was denied rights of facing his accuser, whether or not the Chairman conducted prehearing interviews contrary to regulations. All of these factual issues preclude a Summary Judgment in favor of the Government.

See *Weinberg* v. *Macy*, supra.

QUESTION 4.

WAS THE VETERANS PREFERENCE LAW VIOLATED?

The Veterans Preference Act precludes discharge of Petitioners "except for such cause as will promote the efficiency of the service and for reasons given in writing . . . AND PROVIDED, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative. . . ."

Does "promote the efficiency of the service" mean that experienced and valued employees should be discharged from their right to earn a living—denied their property rights guaranteed under the Fifth Amendment—without review of the administrative body?

In both the Tooni and Edwards cases, there has not been proper opportunity for these veterans to answer the charges lodged against them.

In Tooni's case, the employee was never permitted to answer personally the charges made by Management after the initial decision by the Chicago Regional Office of the Civil Service Commission. It was only *after* the Chicago Region decision that Management made any allegations of fraudulent intent—and this was after the case was in Washington at the Board of Appeals and Review—where the Air Force had a liaison representative but the employee had no liaison representative in Washington, nor any opportunity to answer personally at that level. This would not be so important were it not for the fact that it was only at this level that allegations of fraud and materiality were first made.

Such a discharge does not constitute compliance with either the spirit of the law or the Veterans Preference Act.

In the case of Petitioner Edwards, the right to answer personally was frustrated from October through April of the following year despite repeated requests by the employee, and when an opportunity to answer personally was belatedly afforded Edwards a few days before the decision on his proposed removal, the damage was already done, his job was out the window and the Veterans Preference Act had been shoved aside all during the time when it could have meant everything to the employee in mustering his defenses. Compliance with the Veterans Preference Act must not be a perfunctory compliance but a meaningful one—the employee must be given the opportunity to answer when it is not too late.

In view of all of the procedural errors by Management and denial of rights of Petitioners, can it be said that these discharges promote the efficiency of the service?

Justice demands that Petitioners be restored to their Government jobs.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM R. COEN,
COEN & WAY,
1117 Talbott Tower,
Dayton, Ohio 45402,
Counsel for Petitioners.

May 8, 1969

AFFIDAVIT

State of Ohio
County of Montgomery, SS:

JOSEPH N. TOONI, being duly cautioned and sworn, deposes and says that with respect to his claim of having taken physical chemistry I and II and including this as part of his physics studies and for which he claimed six (6) college credits, he included the laboratory work which he took separately from the lecture work for which credit was given; that further the transcript of his Hope College record shows that in the college years, 1934-1935, he took chemistry 410-a and 410-b theoretical and physical chemistry which were for college credit of two (2) semesters which total eighteen (18) college credits in physics and physical chemistry.

That with respect to his claim of twenty-two (22) college credits, he earned sixteen (16) credits in mathematics at Hope College plus additional mathematics courses at military intelligence schools at Fort Riley Kansas and at Baghdad Military College; that he submitted a copy of SF-57 on approximately December 17, 1955 on which he deleted twenty-two (22) college credits for physics and mathematics combined; it is his belief in subsequent typing, he claimed sixteen (16) credit hours for physics, explained above, and the typist by inadvertence, simply typed mathematics by itself and copied the twenty-two (22) credits from the previous SF-57.

Affiant wishes to cite SF-57 dated December 17, 1955, which lists the following courses as having been taken at Oklahoma A & M: Industrial chemistry ten (10) points, engineering four (4) points, and laboratory organic preparation four (4) credits. This totals eighteen (18) credits and not twenty-eight (28) credits that he was charged with having claimed; that subsequent SF forms 57 show twenty-two (22) credits for work done at Oklahoma A &

M; that it should be eighteen (18); that the six (6) credits he claimed for the heat transfer fuels and lubricants courses relates to the engineering review course which he took at University of California Extension School and which course was paid for by Aerojet General Corporation in Sacramento, California while he was employed by Standard Oil Company of Iraq; that he was attending a night school arranged for by the company to train him in oil engineering which he was not previously mentioned; that it was a petroleum engineering series of classes; that it was his understanding that college credit was awarded for the engineering review course at University of California Extension School; that he did not know that the course was non-credit until February 10, 1964, when he received a telegram from the University of California Extension stating it was non-credit; that he was told by Aerojet and the instructor the course was equivalent to the included courses that were credit courses; that he as a student was told that upon completion of the course, he could qualify to take the State examination for Professional Engineer which requires a minimum of fourteen (14) credits in engineering courses; that he had not had these courses or their equivalent before; affiant states further that referring again to his claim of twenty-two (22) graduate credits, he has explained this in an attachment to SF-57 dated December 18, 1961; that the attachment is dated January 4, 1962; that it shows the twenty-two (22) credits to consist of work done at Oklahoma A & M and Institute of Applied Science; that he has earned eighteen (18) credits as explained above at Oklahoma A & M and twenty-six (26) credits at Institute of Applied Science as substantiated by records of his work done at that school; that actually this totals forty-four (44) credits but he claimed only twenty-two (22) credits.

Affidavit

Reference to paragraph 4c(1) of Notice of Proposed Removal. Affiant states the list of technical college courses completed reflects where the undergraduate courses listed were taken, namely at Hope College, Kalamazoo State Teachers College, and at New York Institute of Applied Arts and Sciences. Engineering mechanics I and II and strength of materials were taken by him at New York Institute of Applied Arts and Science; that at Hope College, he took physical chemistry I and II, and comprehensive chemical engineering programs; that he took heat transfer and fluid flow (fluid mechanics) and thermodynamics at University of California Extension in Sacramento; that he studied high polymer theory and practice and chemical engineering analysis in Iraq with Standard Oil Company of Iraq; that when he first went back to Iraq in 1936, he was employed as superintendent of oil affairs of Baghdad during the day; that at night, he taught at Baghdad Higher High School, the equivalent of a Junior College where he taught from 1936 to 1938; that he also took courses in the Higher High School during the same time.

Reference is made to paragraph 4c(2) Notice of Proposed Removal. Concerning the graduate courses at issue, affiant states that he took physical chemistry and industrial chemistry at Oklahoma A & M; that the fuels and lubricants course, structural design, engineering mechanics and power equipment were taken in Iraq with Standard Oil Company; that the remaining courses in the list are thermodynamics, strength of materials and the engineering refresher course itself which were taken at University of California Extension.

Reference is made to paragraph 4(3) Notice of Proposed Removal relating to numbers assigned to the separate courses listed under the heading "List of Technical Courses Completed"; that he either designated the num-

bers as semester hours or he did not assign a heading at all to such numbers. Affiant further states that at no time did he call such numbers credit hours; that in his mind, semester hours means the equivalent in time spent in such courses; that at no time did he wish to represent that he had credit hours for all the courses listed in the attachment; that he had intended that the list would further clarify the nature of his professional educational training; that actually when you total his graduate hours, they do total forty-four (44).

Affiant states that with reference to the charge of falsifying item number 33 through the omission of required information relating to arrests, he was driving and he stopped to ask a police officer for directions to the Racquet Club and this was in front of the Rocket Bar to which he had already been directed; that the officer assumed he was drunk because he was otherwise occupied and affiant had to ask the officer the same question 2 or 3 times; that the officer may have felt affiant did not know affiant was already where it seemed he wanted to be. (Officer misunderstood "Racquet" for "Rocket"). The officer was putting youngsters who were in the Rocket Club into the police wagon; and was probably irritated and the officer told affiant to get in the wagon also; that at the police station, affiant was told to pay Ten Dollars ($10.00) and told it would be forgotten about; affiant understood there would be no record made of the incident; affiant then went back to his car and drove to the Racquet Club. Affiant was not drunk; that the entire incident took less than two (2) hours including a fifteen (15) minute walk back to his car. Affiant did mention his arrest in Upper Marlboro, Maryland, and he would have mentioned the Dayton, Ohio incident if he had felt it was really recorded as an arrest.

Affidavit

Reference is made to Notice of Decision—Removal dated April 2, 1964, paragraph 3(h). Affiant does not believe that anything should be inferred from the mere fact that he had amended his SF-57 to conform to the evidence made available to the Air Force Agency; affiant still stands fast on his statement that no falsification was intended in the preparation of any of his SF-57's; that at no time has he had any motivation to falsify his SF-57 which has remained substantially the same from 1958 to 1964; affiant received his GS-12 in January, 1960, based upon experience on the job; affiant states that he never said that his first and second level supervisors were "liars or dishonest"; that in SF-971. Employees Performance Rating, in April, 1963, he was marked low on "Loyalty to His Employer"; and all he did was make a statement that this was not true or honest, confining his remark to the low rating; that he never did tell his supervisors that they were "liars or dishonest"; that he told this to Mr. Leuben, his supervisor, at that time, and who rated him in this way; that Mr. Leuben is in no way a part of the removal charges per se; but, however, Mr. Leuben was instrumental in originating the oral admonishment based upon affiant's saying the rating was not honest; that Major Mente was not present at this time but has accused him of saying Mr. Leuben and Major Mente were "liars and dishonest."

That Mr. Leuben competed with him for the position of supervisor and which position Mr. Leuben secured in July, 1962; that Mr. Leuben explained to him that by rating him low in "Loyalty to His Employer", he had in mind remarks which affiant made comparing himself to Mr. Leuben during such competition; that such remarks which affiant made then were to the effect that affiant had more experience than Mr. Leuben did; that after Mr.

Leuben became supervisor, affiant never made such remarks; that they never had any difference of opinion to speak of until the performance rating in question; that affiant's performance rating had always been satisfactory or excellent.

In conclusion, affiant states that he at no time had any intent to defraud or misrepresent anything in his SF-57; that he has served satisfactorily since 1947, entering the government service as a chemist; that he at no time received any promotions or transfers that he did not earn through experience; that he never intentionally misrepresented any material fact. Affiant does not believe that the discrepancies claimed by the Air Force are significantly material in view of the lack of intent to defraud to warrant dismissal or removal from federal service.

Under all the facts and circumstances of this case, affiant believes the removal from his job to be too severe a penalty; that he thinks his foreign extraction must be taken into consideration in regard to the misunderstanding with his supervisors.

/s/ JOSEPH N. TOONI
JOSEPH N. TOONI

Sworn to before me and subscribed in my presence this 31st day of January, 1967.

/s/ WILLIAM R. COEN
Notary Public

Letter of Proposed Removal

LETTER OF PROPOSED REMOVAL

SGME 07 FEB 1964

Notice of Proposed Removal

SGMES-20 (Mr. Joseph H. Tooni)

1. It is proposed to remove you from your position with the Air Force not earlier than 30 days after receipt of this letter.

2. This action is predicated upon your having falsified official documents. You furnished false information on your educational background both at the undergraduate and graduate levels. You listed college courses which you never had taken and college credits which you never had received. You further stated that you obtained graduate credits from a university which is nonexistent. In addition, you failed to furnish complete information on your arrest record in that you omitted from official documents a particular occasion of having been arrested.

3. This proposed removal is specifically based upon your falsifying the following official documents contained in your official personnel folder:

a. Standard Forms 57, "Application for Federal Employment", dated 18 Dec. 1961, 11 Jan 1960, 9 Sep 1959, and 28 July 1958, as amended by signed statements from you dated 18 Dec 1961 and 4 Jan 1962.

b. Standard Form 61, "Appointment Affidavits", dated 4 Jan 1962.

4. With reference to each of the above listed SF 57's, as amended, you are specifically charged with falsifying the information listed under item number 18, entitled "Education", as follows:

a. Under item number 18.D you listed the following as your chief undergraduate college subjects with accompanying semester credit hours:

Chemistry—32
Engineering—24
Mathematics—22
Physics—16

Official records of your educational background above high school level reveal the above information to be false to the following extent:

(1) That you obtained only 12 semester hours of engineering courses or subjects at the undergraduate college level as opposed to the 24 hours you claimed. The courses which you completed were "Metallurgy I and II" at New York Institute of Applied Science for a total of 12 semester credit hours.

(2) That you obtained only 10 semester hours of physics courses or subjects at the undergraduate college level as opposed to the 16 hours you claimed. The courses which you completed are as follows:

(a) Physics 301—five semester hours from Hope College.

(b) Physics 302—five semester hours from Hope College.

(3) That you obtained only 16 semester hours of mathematic courses or subjects at the undergraduate college level as opposed to the 22 hours you claimed. The courses which you completed are as follows:

(a) Math 2—three semester hours from Hope College.

(b) Math 3—three semester hours from Hope College.

(c) Math 204—Four semester hours from Hope College.

(d) Math 205—Four semester hours from Hope College.

(e) Math 101—Two semester hours from Hope College.

b. Under item number 18.E you listed the following as your chief graduate college subjects with accompanying semester credit hours:

Chemical Engineering—12
Organic Preparation—5
Engineering Mechanics—5
Heat Transfer, Fuels & Lubricants—6

Except for the subject listed as "Organic Preparation", the above information is false in that official records reveal that the only graduate college subject or course which you have taken is Chemistry 570, entitled "Advanced Organic Preparation". This was a three semester hour course completed by you in January 1936 at Oklahoma State University (formerly Oklahoma A&M). It is to be noted that you claimed, in item 18.E, a total of 28 semester credit hours of graduate college level subjects while in actual fact you have obtained only three semester hours.

c. Attached to each of the referenced SF 57's are essentially identical listings entitled "List of Technical College Courses Completed". These attachments are a continuation of item number 18 of the SF 57's. On each you have listed courses which are not supported by the official records of your educational background and, therefore, are false entries.

(1) The false entries which you listed under the heading of undergraduate courses are:

(a) Engineering Mechanics I and II
(b) Strength of Materials

(c) Heat Transfer and Fluid Flow
(d) Physical Chemistry I and II
(e) High Polymer Theory and Practice
(f) Thermodynamics
(g) Comprehensive Chemical Engineering Problems
(h) Chemical Engineering Analysis

(2) The false entries which you listed under the heading of graduate courses are:

(a) Physical Chemistry
(b) Industrial Chemistry
(c) Fuels and Lubricants
(d) Thermodynamics
(e) Engineering Mechanics
(f) Structural Design
(g) Strength of Materials
(h) Power Equipment
(i) Engineering Refresher Course

(3) While not presented as a charge of falsification, it is believed pertinent to point out that you presented misleading information by listing a number alongside each graduate course contained in the above mentioned attachments. These numbers, while listed without benefit of a heading or explanation, do convey the impression that they represent credit hours. When added together these numbers total 40, and appear to represent that you have completed or obtained that number of graduate credit hours. As previously presented, however, you have completed only a three semester hour graduate course.

d. Under item number 18.C you listed, in part, that you had attended California State College, Sacramento, California, during the year 1957 and had obtained 14 semester hours of graduate courses. In the listings entitled "List of

Technical College Courses Completed" attached to each of the referenced SF 57's, you further stated that "Graduate courses were taken at Oklahoma A&M College, Stillwater, Oklahoma; and California State College, Sacramento, California". Aside from the two statements being contradictory, official records of your educational background reveal that the only graduate college course which you have taken was the three semester hour course in chemistry specifically mentioned in paragraph 4b. Your statements that you obtained 14 semester hours of graduate courses from California State College and that you attended such a college are false in that there is no such institute. The official records of your educational background do establish, however, that you did attend the University of California Extension School in Sacramento, California, from 11 Feb to 11 Jul 1957 in which the facilities of Sacramento State College were utilized. While enrolled you did complete a noncredit course entitled "Review of Engineering Fundamentals—874".

5. With reference to the mentioned SF 57 dated 18 Dec 1961, as amended, you are specifically charged with falsifying item number 33 through the omission of required information. You are further specifically charged with falsifying item number 8 to the above mentioned SF 61, dated 4 Jan 1952, through the omission of required information. These items are identical on the SF 57 and 61 and are as follows: "Have you ever been arrested, charged, or held by Federal, State, or other law-enforcement authorities for any violation of any Federal law, State law, county or municipal law, regulation or ordinance? Do not include anything that happened before your 16th birthday. Do not include traffic violations for which a fine of $25 or less was imposed. All other charges must be included even if

they were dismissed. If your answer is "yes" give in Item 34 for each case: (1) approximate date, (2) charge, (3) place, (4) action taken." On each of these forms you answered yes to this question and listed occasions of having been arrested consistent with the dates of the Standard Forms. You failed, however, to list on each of the forms that you had been arrested on 10 Sep 1960 at 238 South Ludlow Street in Dayton, Ohio, on the charge of "drunk" and that as a result you forfeited a $10.00 bond.

6. You are reminded that you received an oral admonishment on 24 Apr 1963 for various infractions, among which was your calling your first and second level supervisors "liars and dishonest". In addition you received an official reprimand dated 9 May 1962 for conduct which gave the impression that you were asleep on duty. Your further received an official reprimand dated 29 Aug 1963 for your insolence and disrespectful behavior towards your immediate supervisor. These previous offenses were considered in addition to the present offense in arriving at the decision to propose your removal.

7. The evidence used to support the charges of falsification contained in paragraphs 4 and 5 above was furnished as a result of an official investigation requested by the Deputy Commander of the former Dayton Air Force Depot. The investigation was requested on 15 Feb 1962, while you were employed at the Depot, based upon receipt of information from another Federal agency. The investigation was completed on 22 Oct 1963.

8. You may answer these charges in person, in writing, or both to the undersigned. You may also submit affidavits in support of your answer. You will be allowed 10 days from the date of receipt of this letter to submit your

answer. In preparation of your reply you are encouraged to review your official personnel folder and the documents with which you are charged as having falsified. This right to reply is a significant right granted to you. If you believe the proposed action is unwarranted, it is important that you reply stating completely all the facts why you believe the proposed action should not be taken. If you care to read the applicable regulations pertinent to this action or obtain information about how you make a reply, you may contact Mr. Jack Rottman of the Civilian Personnel Division, Building 70, telephone extension 76126. This action is being taken in accordance with the procedures set forth in Chapter 752 of the Federal Personnel Manual.

9. No decision to remove you has been made or will be made until after the time allowed you for reply. Any reply you make will be given careful consideration before a final decision is made. Whether or not you reply, a written notice of final decision will be given you. If you do not understand the above reasons for the proposed action, contact the undersigned for further explanation.

10. No action based on the charges set forth above will be taken to remove you from duty status in your present position during this 30 day advance notice period.

/s/ LOREN D. CARLSON
LOREN D. CARLSON, Captain USAF
Acting Chief
Engineering and Technical Division
Directorate of AF Support

Memorandum Decision and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. 3117

JOSEPH E. TOONI,

Plaintiff,

v.

EUGENE ZUCKERT, Secretary of the Air Force,

Defendant.

MEMORANDUM DECISION AND ORDER

(Filed July 3, 1967)

This matter is before the Court upon cross motions for summary judgment. The Court has withheld decision of this action pending a decision by the Court of Appeals in another employee dismissal case which was decided by this Court. On June 22, 1967, the Court of Appeals released its decision in that case, *Fass* v. *Ruegg*, No. 17,031. In that case the Court of Appeals noted the limited role the courts are to play in cases where individuals are dismissed from federal employment and then seek review of their severance. The Court quoted with approval from a decision, *Baum* v. *Zuckert*, 342 F.2d 145, 147 (6 Cir. 1965) wherein Judge Phillips, speaking for the Court, said:

> "The function of a reviewing court in cases involving the discharge of civil service employees is a limited one. . . . The judicial function is to determine whether there has been substantial compliance with the applicable procedures and statutes, and not to review the administrative determination as to the wisdom or good judgment of the agency in exercising

its discretion . . . the courts will not examine into the merits of the dismissal. . . ."

In the instant action plaintiff was removed from federal service; he appealed his removal to the Chicago Region of the United States Civil Service Commission which found in his favor and reversed the removal. The United States Department of Air Force appealed that decision to the Board of Appeals and Review, United States Civil Service Commission, Washington, D. C. That Board concluded that plaintiff's misrepresentations with respect to his undergraduate and graduate studies were intentional and material, being designed to mislead the Air Force into believing he had a strong educational background in engineering studies, whereas, in fact, his professional education preparation was mainly and primarily in Chemistry. The Board concluded that the plaintiff's falsification of his educational record in his application for Air Force employment, when considered in conjunction with his prior record of one oral admonishment and two official reprimands for other established breaches of discipline, warranted his removal from federal service. Under the facts in this case, the foregoing determination cannot be said to be arbitrary or capricious, as urged by plaintiff.

It may be true, as argued by plaintiff's counsel, that the government has lost the services of a skilled and valuable employee; but this Court cannot consider the merits of plaintiff's dismissal. The required procedural steps were followed in plaintiff's dismissal and the review of that dismissal. Accordingly, plaintiff's motion for summary judgment is DENIED; defendant's motion for summary judgment is SUSTAINED.

/s/ CARL A. WEINMAN
Chief Judge U. S. District Court

JUDGMENT

(Filed July 3, 1967)

This action came on for (hearing) before the Court, Honorable Carl A. Weinman, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that upon the cross-motions for summary judgment filed by the respective parties and the court being fully advised in the premises that defendants motion for summary judgment be and it is hereby sustained and Plaintiffs motion for summary judgment is denied and plaintiffs complaint is hereby dismissed.

Dated at Dayton, Ohio, this third day of July, 1967.

/s/ R. L. SNELL
JOHN D. LYTER
Clerk of Court
By: R. L. SNELL, Deputy

Grievance Hearing

GRIEVANCE HEARING

SUBJECT: Grievance Hearing 2 November 1961

TO : Commander
Dayton AF Depot

Thru: Chief, Civilian Personnel

Request grievance hearing as prescribed in AF Manual 40-1 on matters already in hands of authority and command.

#1-INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Deliver *ONLY* to addressee ☐ Show address where delivered

(Additional charges required for these services)

RETURN RECEIPT

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)

Gentile AFD

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

Frank Ayers

DATE DELIVERED

11/6/61

ADDRESS WHERE DELIVERED (only if requested in item #1)

C55—16—71548-4 GPO

Daniel L. Edwards, Jr.
MDHQAI

cc: Commander
Dayton AF Depot

RECEIPT FOR CERTIFIED MAIL—20¢

SENT TO: Chief, Civilian Personnel

STREET AND NO.: Dayton Air Force Depot

CITY AND STATE: Dayton Ohio

POSTMARK OR DATE: DAYTON, OHIO NOV 3 1961 OVERLOOK BR.

If you want a return receipt, check which

☐ 10¢ shows to whom and when delivered

☐ 35¢ shows to whom, when, and address where delivered

If you want restricted delivery, check here ☐ 50¢ fee

FEES ADDITIONAL TO 20¢ FEE

POD Form 3800
Apr 1960

SEE OTHER SIDE

AFM 40-1, AF A-12.5

TS 186 AFM 40-1
31 DEC 61 AF A-12.5

". . . In view of decisions of the United States Supreme Court which have emphasized the importance of adherence to procedural requirements when taking adverse personnel actions, the commander will assure, when making his decision, that there has been compliance with applicable procedures whether externally imposed or established by the Air Force at any level. If unusual circumstances cause a delay, the emplcyee will be notified of the reasons in writing.". . .

DAAFDM 40-1

1 September 1961 DAAFDM 40-1
Chapter 9

* * * * *

e. If the grievance cannot be resolved informally, the supervisor to whom the grievance is presented in writing, will initiate action within 10 working days to obtain pertinent facts; afford opportunity to persons complained against to make a written reply; render a decision, and notify the employee in writing of his decision and reasons. *If the decision is not acceptable to the employee, he will be informed that he may present his grievance in writing, through the remaining supervisory levels, to the Commander.* If the employee requests a hearing, the statement of grievance will be sent to the Civilian Personnel Officer who will insure that an impartial grievance committee is convened within 10 working days of the date of receipt of the request to hear the grievance. If the statement does not contain a specific request for a grievance hearing the employee will be contacted orally to determine whether he

desires a hearing. This information will be recorded with the statement of grievance and forwarded to the Installation Commander.

f. If a committee is not convened, the CPO will ascertain the facts and submit a summary to the Commander, together with findings and recommendations. Both the supervisor and the employee will be permitted to comment on the statements made by the other during the course of the inquiry.

g. Within 10 working days after completion of the hearing, the committee or the CPO, if no hearing was held (paragraph 6f) will prepare a complete record of the grievance to the Commander. The Commander will consider the findings and recommendations of the committee or CPO; make a decision, and give written notice of the decision to the employee within 10 working days of the date on which the recommendations were received.

* * * * *

AMCM 40-2

HEADQUARTERS, AIR MATERIAL COMMAND
AMC MANUAL Wright-Patterson Air Force Base, Ohio
No. 40-2
29 July, 1959

FOREWORD

1. PURPOSE AND SCOPE. *This manual establishes Command policy, applicable* both in the continental United States and overseas with regard *to disciplinary and other adverse personnel action procedures* not specifically defined in Chapters C2 and S1 of Air Force Manual 40-1. This manual is designed to establish a uniform concept of discipline and disciplinary action and to assure that whenever necessary, prompt and effective corrective action will be taken in the interests of maintaining an efficient work force. This manual does not cover any action regarding

retirement, reduction-in-force, actions ordered by the Civil Service Commission, action taken on grounds of political activity or subversive activity, or security (Air Force Regulation 40-12), or actions taken in connection with the performance rating program. In no way does this manual imply an infringement of the employee's rights to use the grievance procedure if he feels he has been disciplined unjustly. (Italics ours.)

2. POLICY. Employees will be fully informed concerning the conditions of their employment, their duties and responsibilities as well as their rights and privileges. The Air Material Command recognizes its obligations to employees and in return expects each employee:

a. To be honest, reliable, trustworthy, and of good character, reputation, and unquestioned loyalty to the Government and the Command.

b. To support and defend the Constitution of the United States of America.

c. To give a full day's work for a full day's pay.

d. To conduct himself on and off the job in a manner that will reflect upon himself and the Air Materiel Command.

e. To respect the administrative authority of those who direct his work.

f. To observe the spirit as well as the letter of the rules and regulations governing his conduct. Emphasis will be placed on the prevention of situations requiring disciplinary actions through the exercise of good management practices. When, however, need for disciplinary action arises, the action which is justified and warranted will be taken promptly, impartially, and constructively.

3. APPLICABILITY. *The policy and procedures set forth in this manual will be applied in order to maintain*

acceptable standards of employee conduct, production, and efficiency and to insure the exercise of sound management-employee relations practices (AMC Regulation 40-14). This manual will be made available to all levels of supervision responsible for civilian personnel management, as indicated in paragraph 6, AMC Regulation 40-7. (Italics ours.)

4. RESPONSIBILITY. The Civilian Personnel Division, Directorate of Personnel and Support Operations, Hq AMC, prepared this manual and will be responsible for the preparation of future revisions or editions.

5. COPYRIGHT. This manual contains no copyright material.

FOR THE COMMANDER:

(SEAL)

ERNEST L. WALTERS
Colonel, USAF
Chief, Administrative Services

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* This manual supersedes AMCM 40-2, 5 Apr 56, and -2A, 14 Jun 56.
OPI: MCAC
DISTRIBUTION: See page (ii)

* * * * *

16. NOTICE PERIODS:

a. Notice periods will vary in length with various types of actions and employees (tables 2 and 3, chapter AF

S1.5, AFM 40-1 and the table in paragraph 20, this manual).

(1) The determination as to what is a reasonable time will depend on all the facts and circumstances of the case.

(2) Sufficient time will be allowed to give the employee ample opportunity to prepare his answer and secure affidavits.

(3) Unless unusual circumstances exist which justify immediate action, the following notice periods for proposed suspension, removal, and separation actions are sufficient:

(a) In cases of suspensions of 30 days or more, a 30 days' notice period will be given preference eligibles. When practicable all other employees will also be given a 30 days' notice period. In no case will the notice period be less than 2 weeks (14 calendar days) for nonpreference eligible employees.

(b) In effecting suspensions due to emergency the length of the notice period may vary depending upon the procedural requirements applicable in individual cases and the urgency of circumstances. It will be necessary to consult the civilian personnel office before processing the emergency suspension.

(c) In Separation (Disqualification), that is, action taken during the probationary or trial period, a notice period of 2 weeks (14 calendar days) will be given.

(d) In Removal actions, it is mandatory that a 30 days' notice period will be given preference eligibles. A 30 days' notice period may be given all other employees; however, a 2 weeks' advance notice (14 calendar days) normally is considered a reasonable notice period for nonpreference eligible employees.

b. The notice period will begin the day *after* the employee receives the advance notice of proposed action, and

will terminate at the close of the last day of the notice period. Only *full calendar days* will be counted. For example, a 30 days' notice period is given the employee. The advance notice of proposed removal is received by the employee on 1 April. The notice period is computed as having started the next day, 2 April, and will be terminated at the close of the 30th day thereafter. The action will be effected not earlier than the close of the employee's regular hours of duty on the day on which the full notice period is completed.

c. The civilian personnel office may be consulted in these matters for further information as to regulatory requirements for determining notice periods.

17. STATUS OF EMPLOYEE DURING NOTICE PERIOD:

a. Normally, the employee will be retained in his position in a work status during the notice period of a pending suspension, removal, or separation action.

b. The immediate supervisor, through the appropriate operating official, may request that the employee be withdrawn from his position and/or the work area for the period if there is valid reason to believe his presence:

May result in damage to Government property.

May be detrimental to the interests of the Government.

May be injurious to the employee, his fellow workers, or the general public.

c. When it is necessary to place the employee in another position during the notice period, an appropriate written request, stating why the action is necessary, will be forwarded to the civilian personnel office for consideration. On the basis of reasons given and applicable procedural requirements, a determination will be made as to the exact status of the employee during the notice period.

d. In the advance notice of proposed action, the employee will be advised of his duty status during the notice period.

18. NECESSITY OF NEW ADVANCE NOTICE:

a. When the action decided upon is the same as or less severe than, the action stated in the advance notice, and is based on the reasons or charges specified in the advance notice, no new notice of proposed action is necessary.

(1) Regardless of its significance any error in the notice should be corrected. Minor typographical errors may be corrected by pen and ink change on all copies of the notice if the correction is not significant to the reasons or charges in the proposed action, and if the correction in no way violates the employee's rights.

(2) When the error is considerable, but does not involve any change in the reasons, charges, or the proposed action, a corrected notice may be issued. For example, a corrected notice should be issued if there is an omission of required information, such as, failure to cite the regulatory authority, to give the location and telephone number of the placement and employee relations adviser named, or to give all information about the importance of the employee's reply. When necessary, the notice period may be extended with the issuance of a corrected notice so that the employee will have full opportunity to consider the additional information and make a reply, if he so desires.

(3) In the event a lesser penalty than that originally proposed is determined appropriate after reviewing the employee's reply and/or reconsideration of the offense, the employee will be so advised in the letter of final decision.

b. A new advance notice will be issued if the following conditions apply:

(1) A more severe penalty is decided upon.

(2) When the action set forth is based, either in whole or in part, on reasons or charges not specified in the advance notice.

c. When a new advance notice is given, all procedural requirements, including the notice period, will be complied with anew.

* * * * *

LETTER—COL. LAWTON

HEADQUARTERS
MIDDLETOWN AIR MATERIEL AREA
UNITED STATES AIR FORCE

Detachment 14, Heath Annex
Wright-Patterson Air Force Base, Ohio

Reply to
Attn. of: MAHQI (SEAL)
20 Apr. 62

SUBJECT: Notice of Proposed Removal and Decision to Remove—Inefficiency

TO: MAHQI (Mr. Daniel L. Edwards, Jr.)

1. This letter corrects an error appearing in Paragraph 8 of MDHQA letter of 15 February 1962 by deleting section 9.102(a)(1) and inserting Part 22 of the Civil Service Regulations.

2. You have received job protection rights under Part 22 of the Civil Service Regulations and Section 14 of the Veteran's Preference Act, as shown by the 30 day notice period, the lengthy extension of time for reply to the notice, and the appeal rights shown in the 16 April notice of decision.

/s/ THOMAS O. LAWTON, JR.
THOMAS O. LAWTON, JR.
Colonel, USAF
Director of Heath Operations

Section 5

THE HEARING PROCESS

1. GENERAL. The hearing process provides a complainant the opportunity to present his dissatisfaction to an ad hoc committee. This process is used to consider such matters as dissatisfactions with working conditions or work relationships, personal bias or prejudice, performance ratings, and adverse personnel actions.

2. AD HOC GRIEVANCE COMMITTEE.

a. When it is determined that the hearing process is the appropriate means for consideration of a grievance the commander will appoint a committee on an ad hoc basis. Every effort will be made to select members who will be impartial in weighing the facts and will use sound judgment in arriving at recommendations. The membership of this committee will be composed of Air Force personnel and will consist of three voting members and a non-voting chairman. At least two of the three voting members will be civilian employees of the installation. Members will be selected from outside the immediate organizational unit to which the aggrieved employee is assigned or from which he was separated. The appellant will be permitted to select one voting member. The selection will be made from the roster established under the provisions of paragraph *3c*, Chapter AF P-4.5. A non-voting chairman generally will be selected from among the best qualified members of the servicing civilian personnel office. In the event a key member of the civilian personnel office staff is directly involved

in the grievance, e.g., he is the person against whom the complaint is lodged, or will appear as a witness, the chairman may be selected from outside of the installation civilian personnel office.

b. The committee is a fact-finding and advisory body. Its purpose is to assist the commander in arriving at a prompt and fair decision when reviewing an action taken by an operating official. This is accomplished by making a full and complete evaluation of the evidence in the matter and by furnishing the commander the grievance record (paragraph *12*, Section 2) upon which the committee's recommendations are based.

c. The Secretary of the Air Staff will appoint a grievance committee on an ad hoc basis for hearing grievances emanating from employees in Headquarters USAF and the Office of the Secretary of the Air Force. The composition and functions of this committee will be the same as those provided for the grievance committee at installations.

3. PREPARATION FOR THE HEARING.

a. The chairman of the committee, upon receipt of a request for a hearing, will give all persons immediately concerned written notification of the hearing. These notices will be given sufficiently in advance to permit adequate preparation for the hearing and will:

(1) Indicate the date, time, and place of the hearing, and the nature of the grievance to be considered.

(2) Inform the complainant and the persons(s) complained against of their right to request witnesses to appear in their behalf or to present signed statements from witnesses if witnesses are not available. This notification will state that persons desiring to bring witnesses will furnish the committee chairman with their names together with an indication

of how the testimony of each would be relevant. Both the appellant and the person complained against will be supplied with a list of the witnesses of the other party. The notification also will include the following information:

(*a*) The chairman will request, in writing, the attendance of all witnesses whose testimony has been determined to be relevant and who are Air Force personnel.

(*b*) Witnesses are expected to furnish facts freely and honestly as a basis to a fair and equitable decision.

(*c*) Only witnesses will be heard who, in the opinion of the committee, are in a position to offer testimony relevant to the grievance; whose presence is considered necessary to a fair consideration of the grievance; and whose presence at the hearing is practical.

(3) Advise all persons concerned of their right to:

(*a*) Obtain and submit documentary evidence.

(*b*) Obtain advice from the civilian personnel office relative to regulatory and procedural aspects of preparing the case.

(*c*) Have, or examine, a copy of the grievance procedure.

(*d*) Attend a pre-hearing interview.

(4) Advise the complainant:

(*a*) That he must appear personally before the committee and of his right to arrange for representation at the hearing.

(*b*) Of his right to select one member of the ad hoc grievance committee from the roster furnished with the notice.

b. When the committee chairman requests an Air Force employee to appear as a witness at the hearing, the request will be in writing and sent direct to the employee with a

copy to the employee's supervisor. The employee will be advised that it is his duty to testify, that the testimony of witnesses given freely and honestly is basic to a fair and equitable decision and that his appearance as a witness will be free from any form of interference, criticism, or reprisal on the part of management.

c. In no instance will any person exercise persuasion or coercion in an attempt to influence an employee appearing as a witness at a grievance hearing.

d. If necessary to assure attendance of witnesses, the committee will request appropriate administrative authority to require their presence. The committee, at its decretion, may call witnesses in addition to those originally requested by either party to the matter.

e. The procedures established by Executive Order 10925 and Section .7 of this Chapter will be explained to each employee requesting a grievance hearing before the hearing is granted. The employee will be requested to sign a statement indicating that the above mentioned procedures have been explained and that his grievance is not related to discrimination because of race, color, religion or national origin. If the individual indicates that the matter under consideration is due to discrimination, he will be referred to the deputy employment policy officer.

f. The civilian personnel officer will furnish advisory service to all persons concerned in preparing for a hearing. He will designate the member(s) of his staff, other than the chairman of the committee, to conduct prehearing interviews with the aggrieved employee or his representative and the operating official or his representative.

(1) *The Aggrieved Employee.*

(*a*) In order for the civilian personnel office to exercise its function of advising an employee regarding any question connected with the written statement

of grievance it is essential that the employee state his complaint fully and in detail about time, place, dates, events, and all other information pertinent to the grievance; and to state clearly the remedy he is seeking.

STANDARD FORM 50

NOTIFICATION OF PERSONNEL ACTION

(EMPLOYEE—See General Information on Reverse)
Standard Form 50—Rev. Dec. 1961
U.S. Civil Service Commission
FPM R-1 50-110-03

1. Name (Caps) Last-First-Middle Mr.-Miss.-Mrs.: EDWARDS, JR., DANIEL L., MR.

* * * * *

3. Birth Date (Mo., Day, Year): 05-11-23
4. Social Security No.: 403-26-6602
5. Veteran Preference: 2 (2—5pt.)
6. Tenure Group: 1
7. Service Comp. Date: 09-13-42

* * * * *

9. FEGLI: 1 (1—Covered)
10. Retirement: 1 (1—CS)

* * * * *

12. Nature of Action: 345 (Code) Removal—Inefficiency
13. Effective Date: (Mo., Day, Year): 04-23-62

* * * * *

15. From: Position-Title and Number: Missile Inspection Specialist (Guidance) HQA-1476
16. Pay Plan and Occupation Code: GS-1950
17. Grade or Level: 12
18. Salary: pa 10,255

Standard Form 50

19. Name and Location of Employing Office: AFLC, MAAMA, Detachment #14 (Heath Annex), Dir of Heath Operations Quality Control Div, Quality Assurance Br, Olmsted AFB, Pennsylvania

* * * * *

25. Duty Station (City-County-State): Wright-Patterson AFB, Ohio

* * * * *

27. Appropriation: 431

28. Position Occupied: 1 (1—Competitive Service)

* * * * *

30. Remarks: * * *

Functional Code: 442L10-23

AFSC: 03054

Action taken for unsatisfactory performance of duties as outlined by your supervisor and contained in your official position description.

Notice of proposed action dated 02-15-62, received 02-19-62. Reply dated 04-03-62 and replied orally 04-11-62. Notice of final decision dated 04-16-62.

SF 55 issued 04-20-62. Mailing Address: 8828 Fairfield Avenue, Dayton 31, Ohio

* * * * *

32. Office Maintaining Personnel Folder (If different from employing office): DESC (DESC-AR) Dayton, Ohio

33. Code Employing Department or Agency: AF 05 Department of the Air Force

34. Signature (Or other authorization) and Title for the Appointing Officer: /s/ BRAD ROBBINS—Director, Industrial Relations Office

35. Date: 04-19-62

(1. Employee Copy)

Special Order Appointing Committee

SPECIAL ORDER APPOINTING COMMITTEE

HEADQUARTERS
WRIGHT-PATTERSON AIR FORCE BASE (AFLC)
United States Air Force
Wright-Patterson Air Force Base, Ohio

(Letterhead)

SPECIAL ORDER 14 May 1962
M-104

Under the provisions of Chapter AF A-12, Section 5, AFM-40-1, the following named Air Force Personnel is appointed an AD HOC Grievance Hearing Committee to meet at the call of the Chairman for the purpose of hearing the grievance of Mr Daniel L Edwards, Jr, Missile Inspection Specialist (Guidance), GS-12, Directorate of Heath Operations, and to make recommendations to the Comdr, Middletown Air Materiel Area, for his decision.

Charles A Bradshaw, Placement & Employee Relations Advisor, GS-7 (Chairman without vote)	MAHRA
Francis R Bush, Logistics Specialist, GS-13 (Voting Member)	SANBS
Mrs Henrietta R Oliver, Supv Accountant, GS-11 (Voting Member)	MCCOEC
Mr Lawrence E Toedte, Logistics Officer, GS-14 (Voting Member)	MCFW
Mary L Williams, Shorthand Reporter, GS-9, Recorder (Without vote)	EWJ

FOR THE COMMANDER:

[OFFICIAL SEAL]

Glen E Martin
Administrative Officer
Administrative Services

DISTRIBUTION:
L

LETTER, COL. LAWTON, MAHQI

HEADQUARTERS
MIDDLETOWN AIR MATERIEL AREA
United States Air Force
Detachment 14, Heath Annex
Wright-Patterson Air Force Base, Ohio
(Letterhead)

Reply to Attn of: MAHQI 20 Apr 1962

Subject: Decision to Remove—Inefficiency

To: MAHQI (Mr. Daniel L. Edwards, Jr.)

1. My letter of 16 April 1962 notified you of my decision to remove you on 20 April 1962.

2. You are now advised that the removal date will be 23 April 1962.

3. Other provisions of my 16 April 1962 letter remain unchanged.

/s/ THOMAS O. LAWTON, JR.
THOMAS O. LAWTON, JR.
Colonel, USAF
Director of Heath Operations

Memorandum Decision and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. 3059

DANIEL L. EDWARDS, JR.,

Plaintiff,

v.

EUGENE ZUCKERT, Secretary of the Air Force,

Defendant.

MEMORANDUM DECISION AND ORDER

(Filed July 3, 1967)

This matter is before the Court upon plaintiff's amended motion for summary judgment and defendant's amended motion for summary judgment.

The law with respect to the removal of a federal employee such as plaintiff has been stated in a very recent case decided by the Court of Appeals for the Sixth Circuit, *Fass* v. *Ruegg*, decided June 22, 1967 (17,031).

In the government's brief in support of its amended motion for summary judgment, the government sets forth in detail the reasons for plaintiff's dismissal and the chronology of events. Those facts are not denied by plaintiff. The Court finds that the required procedural steps were followed in the removal of plaintiff from his position and no procedural rights were denied plaintiff in the subsequent reviews. Accordingly, plaintiff's motion for summary judgment should be and hereby is DENIED; defendant's motion for summary judgment should be and it hereby is SUSTAINED.

/s/ CARL A. WEINMAN
Chief Judge U. S. District Court

JUDGMENT

(Filed July 3, 1967)

This action came on for trial (hearing) before the Court, Honorable Carl A. Weinman, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that upon the cross-motions for summary judgment filed by the respective parties and the court being fully advised in the premises that the defendants motion for summary judgment be and it is hereby sustained and Plaintiffs motion for summary judgment is denied and plaintiffs complaint is hereby dismissed.

Dated at Dayton, Ohio, this third day of July, 1967.

/s/ R. L. SNELL
JOHN D. LYTER, *Clerk of Court*
BY: R. L. SNELL, *Deputy.*

LETTER, AFLC, W-P AFB, OHIO, DATED 13 DEC. 1962

Headquarters
AIR FORCE LOGISTICS COMMAND
United States Air Force
Wright-Patterson Air Force Base, Ohio

Reply to Attn of: MCACA 13 Dec 1962

To: Mr. Daniel L. Edwards, Jr.
8828 Fairfield Ave.
Dayton 31, Ohio

Dear Mr. Edwards

1. Reference is made to your claim submitted to the Comptroller General which was forwarded to this Headquarters through Air Force Accounting and Finance Cen-

ter for local settlement. Considerable difficulty was encountered in locating all of your pay and personnel records necessary to adjudicate your claim. It is regretted these difficulties have caused delays in settlement.

2. Listed below are the three separate accounts for which you claim payment for compensation:

a. 2¾ hours compensation 20 October 1961

b. 8 hours compensation 30 November 1961

c. The reduction of 16 hours from your annual leave balance of 222 as shown on AF Form 530-1.

3. Under Public Law 623 you are entitled to pay for the 8 hours (LWOP) suspension on 30 November 1961. You are also entitled to 2¾ hours of pay for the LWOP charge which was made on 20 October 1961, *since your absence was approved and was considered official business.*

4. The reduction of 16 hours from your annual leave balance of 222 as shown on AF Form 530-1 is explained below. It is to be noted the annual leave balance of 222 hours was lined out and changed to 206.

a. Eight hours was deducted for the 8 hours (LWOP) suspension 30 November 1961. In other words the LWOP on 30 November 1961 was changed to annual leave and deducted from your leave balance. Reimbursement was made for this day on the pay period ending 28 April 1962.

b. The annual leave balance shown on AF Form 530-1 is a machine printed amount based on 8 hours of annual leave accrual through pay period ending 28 April 1962. Since your separation was effective on 24 April 1962 you were not entitled to any leave accrual during this period. These 8 hours of annual leave were deducted from the machine printed amount of 222.

5. Your final salary payments included the following:

48 hours compensation for 16 April 1962 through 23 April 1962.

Official time and attendance records for this period indicate you were in a duty status on 16, 17, 18, 19, 20, and 23 April 1962.

8 hours compensation for 30 November 1961 for which your annual leave balance was reduced.

Regular earnings—above 56 hours—$276.64

206 hours lump sum leave for period 24 April through 6 hours on 29 May 1962.

Lump sum leave 206—$1,017.64

6. Payment of 10¾ hours of compensation for which you are entitled will be made by the Finance Officer, Newark Air Force Station, Newark, Ohio in the near future.

Sincerely

/s/ E. A. ELY
E. A. ELY
Chief, Personnel Standards Branch
Civilian Personnel Division

LETTER, COL. NORTH

Office of the Commander

Headquarters
2907th AIR BASE GROUP (DAAFD)
United States Air Force

Gentile Air Force Station
Dayton 20, Ohio
23 Jan 1962

(Letterhead)

Subject: Grievance—Daniel L. Edwards

To: Mr. Daniel L. Edwards
8828 Fairfield Avenue
Dayton 31, Ohio

Letter, Col. North

Dear Mr. Edwards

1. I have reviewed the record of your grievance and the report of the Grievance Committee which convened on 18 January 1962, to hear your grievance in accordance with your request and applicable Air Force regulations.

2. The prime issues given consideration in arriving at my decision were:

a. All government employees have the right of direct recourse to the Inspector General at all times without hindrance or censure.

b. There was no clearly defined evidence presented to substantiate the charge that you went outside proper channels and obtained signature permission on the pass through misrepresentation or subterfuge.

3. In consideration of all the evidence in the grievance record and in the interest of maintaining an effective and efficient work force, it is my decision that the action taken to suspend you from duty for charges as stated is unwarranted, not justified and will be rescinded.

Sincerely

/s/ C. L. NORTH
C. L. NORTH
Colonel, USAF
Commander

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18,288-18,229
(Filed 16 Oct. 1968)

18,228—JOSEPH N. TOONI,

Plaintiff-Appellant,

v.

EUGENE ZUCKERT, ETC.,

Defendant-Appellee.

18,229—DANIEL L. EDWARDS, JR.,

Plaintiff-Appellant,

v.

EUGENE ZUCKERT, ETC.,

Defendant-Appellee.

ORDER

Before: WEICK, Chief Judge, CELEBREZZE and PECK, Circuit Judges.

In these consolidated cases Appellants appeal from an order of the District Court for the Southern District of Ohio, Western Division at Dayton, sustaining the action of the Secretary of the Air Force in removing the Appellants from civil service employment by the United States Department of Air Force.

Upon consideration of the record, briefs and arguments of counsel, we find no procedural rights were denied the Appellants; and, considering the record as a whole find there was substantial evidence to sustain the removals.

It is ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ CARL W. REUSS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,228
(Filed Dec. 10, 1968)

JOSEPH N. TOONI,

Appellant,

vs.

EUGENE ZUCKERT, Secretary of the Air Force,

Appellee.

ORDER

Before: WEICK, Chief Judge, CELEBREZZE and PECK, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be, and hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ CARL W. REUSS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,229
(Filed Dec. 10, 1968)

DANIEL L. EDWARDS, JR.,

Appellant,

vs.

EUGENE ZUCKERT, Secretary of the Air Force,

Appellee.

ORDER

Before: WEICK, Chief Judge, CELEBREZZE and PECK, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be, and hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ CARL W. REUSS
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI AND DANIEL L. EDWARDS, JR.,
PETITIONERS

v.

ROBERT C. SEAMANS, JR.,
SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the attention of the Court to the following facts, which show that the petition for a writ of certiorari was filed out of time.

On October 16, 1968, the court of appeals entered its judgments—which upheld the action of the Secretary of the Air Force in dismissing the petitioners from civil service employment—and on December 10,

1968, it denied timely petitions for rehearing. On March 8, 1969, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari for 60 days to May 9, 1969 (Pet. 1-2). The petition was filed on May 10, 1969, 151 days after the denial of rehearing.

28 U.S.C. 2101(c) provides that

> any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Since these limits are jurisdictional, the petition should be denied as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
Petitioners,

v.

ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE ON BEHALF OF DISTRICT LODGE 23; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

CHARLES F. HORN
HORN, MOORE & RIFE
Suite 216
2185 S. Dixie Drive
Dayton, Ohio 45409

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

IN THE

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

District Lodge 23, International Association of Machinists and Aerospace Workers, Fairborn, Ohio, hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of Petitioners, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the Petitioners has been obtained. The consent of the attorneys for the Respondents was requested but refused.

District Lodge 23 is the governing body for four lodges which are the exclusive bargaining agent for approximately 4,500 Federal employees at Wright-Patterson Air

Force Base and Defense Electronics Supply Center, Dayton, Ohio.

The federal government's executive branch is the largest single employer in the United States. Therefore, what happens to the integrity, dignity, self-respect and independence of federal workers is of monumental import to *all* American workers.

We believe the above case presents questions of national importance since it affects the appeal and review rights of all federal employees, and further presents an important issue of separation of powers.

The attached brief discusses in more detail the reasons this motion should be granted.

Respectfully submitted,

/s/ CHARLES F. HORN
CHARLES F. HORN
HORN, MOORE & RIFE

BRIEF AMICUS CURIAE ON BEHALF OF DISTRICT LODGE 23, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the Separation of Powers Doctrine of the Constitution of the United States. In addition to those questions set forth by Petitioners in their Petition, the following questions present themselves:

1. Does the Separation of Powers Doctrine require judicial review of executive agencies actions?
2. Does the Administrative Procedure Act, 5 USCA § 702, apply to assure judicial review of removal by federal agencies of its employees?

INTEREST OF AMICUS CURIAE

District Lodge 23, International Association of Machinists and Aerospace Workers, Fairborn, Ohio, is the governing body for the following local lodges:

LOCAL LODGE 2065 — representing approximately 800 employees of the Flight Test Directorate at Aeronautical Systems Division and the Law Enforcement Division, 2750th Air Base Wing.

LOCAL LODGE 2284 — representing approximately 700 employees both salaried and wage board of Defense Electronics Supply Center and Central Heating Plant.

LOCAL LODGE 2333—representing approximately 2,500 employees of the 2750th Air Base Wing Wage Board.

LOCAL LODGE 2331 — representing approximately 500 employees of the Base Restaurant System and Base Exchange.

Each of these lodges is the exclusive bargaining agent for the employees involved.

District Lodge 23 is affiliated with the Grand Lodge, IAM&AW.

Since the federal government is the largest single employer in the United States, the review afforded federal employees affects millions of individuals and their families.

In private industry, employee grievances, even those based on "internal rules" agreed upon between a Union and an employer, or even the unilaterally imposed "rules" of employment set by a private employer, may, after the "internal administrative procedures available" have been exhausted, take the substantive issues to the Federal court system, for consideration of the *merits* of the case.

In the public sector, as compared with private industry, and most ignominiously in the *Federal* portion of that sector, such rights are non-existent.

The apparent theory relied upon to justify limited judicial review is that the judicial branch should not interfere with the day to day operation of the executive branch. However, the Separation of Powers Doctrine was conceived to guarantee a "check and balance" against the other two branches of government.

District Lodge 23, International Association of Machinists and Aerospace Workers, has a duty to protect the rights of the federal employees it represents and quite naturally takes a keen interest in the outcome of adverse actions against federal employees. More specifically, this Union has an obligation to speak up when unhealthy trends begin developing. In the instant case the trend of limited judicial review is already far down the road to erasing the constitutional right of judicial review.

ARGUMENT

The first question involves the issue of Separation of Powers.

The cases of *Myers* v. *United States*, 272 U.S. 52 (1926) and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) set forth the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered.

The government apparently takes the position that judicial review of an agency removal is limited. The government would have this Court believe that the function of a reviewing Court in cases of this kind (appeal of agency removal) is limited to determining whether there has been substantial compliance with the applicable procedures and statutes and not look into the merits of the dismissal. True, there is a line of authority for this approach.

However, there is another line of authority holding in effect that an employee must exhaust his administrative remedies before applying for judicial relief. Tooni and Edwards exhausted their administrative remedies, but they have been unable to obtain redress in the Courts.

The issue that now presents itself becomes a matter to be resolved by the Supreme Court of the United States. Does the Separation of Powers Doctrine apply, to review actions by the executive branch? If so, is it proper for the present cases to be summarily dismissed based upon the Sixth Circuit cases which did not present the same legal and factual questions? *Fass* v. *Ruegg*, 379 F.2d 216 (CCA, 6th, 1968); *Baum* v. *Zuckert*, et al, 342 F.2d 145 (CCA, 6th, 1965).

The question that prompts this brief *amicus curiae* to be filed is one of principle. We agree that Petitioners' Tooni and Edwards have not received adequate judicial review.

We are concerned that thousands of other federal civil service employees in like circumstances may not receive proper judicial review unless guide lines are laid down by this Court as to when the judicial branch will perform its function of review and when it will not. Counsel finds that the cases cited by Petitioners, such as *Louks* v. *United States*, 395 F.2d 993 (Ct. Claims 1968) and *Scott* v. *Macy*, 349 F.2d 182 (CCA, D.C. 1965), approach review on the merits. Yet in the present cases there seems to be no review at all.

And of all branches, the executive is the branch in which excess of power is most dangerous to the overall concept of a democratic society because what becomes matter of fact procedure internally within the power structure of the executive branch may by that very ordinariness, become the established "fact" upon which the rights and freedoms of all citizens may one day be based. If this matter of fact system happens to be totalitarian, authoritarian, unilateral, capricious and whimsical, and if it extends by osmosis from within the executive system of the federal government to the dependent industrial contracting system and from there into the total employing enterprise system in the nation—then our "democracy" will have been totally destroyed.

The second question consists of the applicability of the Administrative Procedure Act to agency removals.

5 USCA § 702 provides as follows:

> "§ 702—Right of Review
>
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

§ 703 provides that in the absence or inadequacy of special statutory review, . . . "the form of proceeding for

judicial review is . . . any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

The Congress wisely made administrative decisions subject to judicial review. *Blackmar* v. *Guerre*, 342 U.S. 512 (1952) does not answer this question due to the fact that the District Court had proper jurisdiction by virtue of 28 U.S.C.A. § 1361.

CONCLUSION

This case presents important questions of national concern. Serious consequences may result if the executive branch by virtue of its agency, the Air Force, making decisions on its own, slowly but surely becomes a superior being—perhaps abusing its power to the detriment of millions of Americans who can no longer protest because we are too far down the road of limited judicial review.

Respectfully submitted,

CHARLES F. HORN
HORN, MOORE & RIFE
Suite 216
2185 S. Dixie Drive
Dayton, Ohio 45409
Attorneys for District Lodge 23, International Association of Machinists and Aerospace Workers

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FILED
JUN 18 1969
JOHN F. DAVIS, CLERK

IN THE

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OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
Petitioners,

v.

ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS CONTRA MEMORANDUM OF RESPONDENT

WILLIAM R. COEN
COEN & WAY
1117 Talbott Tower
Dayton, Ohio 45402
Counsel for Petitioners

Petitioners respectfully submit that the Court should consider this case timely filed.

The only reason the Clerk of the Supreme Court docketed the case on May 10, 1969 was that the Record from the Sixth Circuit Court of Appeals did not come into the physical possession of the Clerk until the morning of May 10, 1969.

Counsel for Petitioners ordered the Record on April 30, 1969, confirmed the request with the Deputy Clerk in the Sixth Circuit Clerk's Office the following day while counsel was in Cincinnati, and confirmed in writing the request, letter appended hereto.

The printer type-set, called counsel for Petitioners who drove from Dayton to Cincinnati and proof read the 74 page Petition, printed and mailed the necessary copies causing them to arrive at the Office of the Clerk of the Supreme Court at least 2 days prior to May 9, 1969.

Counsel for Petitioners at the same time filed his Proof of Service, Docket Fee and a letter requesting the Clerk to call him if there was anything else required to complete the filing.

In the meantime, about Monday, May 5, 1969, Counsel for Petitioners mailed a brief note to the Clerk of the Sixth Circuit reminding the Clerk of the importance of mailing the Record, if it had not already been mailed; and if there were any question to please call him.

While Counsel for Petitioners was attending a Seminar at the Ohio State Bar Association Convention, at the Neil House in Columbus, Ohio on Thursday, May 8, 1969 he received a message to call Mr. Shade at the Supreme Court, which counsel immediately did. Mr. Shade advised counsel that the Record had not yet been received and that perhaps it should be checked on.

Counsel immediately called the Clerk of the Sixth Circuit and was advised that the Record was "all ready to be

mailed." A discussion was had regarding whether or not the Record would arrive by the next day and the Deputy Clerk assured counsel that it would be there in time. Counsel then asked the Clerk to please send the Record Air Mail—Special Delivery, just to make sure, and the Clerk agreed.

Counsel then called Mr. Shade back and reported what had happened. Counsel even inquired whether it would be possible to give the Record, which was small, to Mr. Justice Byron White as he was scheduled as guest speaker for the Ohio State Bar Convention dinner meeting Friday evening, May 9, but Mr. Shade advised that a Petition for Certiorari was to be presented to the full Court and not to a single Justice. Further discussion was had and it appeared that the Record should arrive on time, especially if it were mailed "Air Mail—Special."

Counsel for Petitioners made an additional phone call to the Clerk of the Sixth Circuit and verified that the Record was being Air Mailed, Special Delivery. Counsel made a special point of the Special Delivery and requested the Clerk to mark on the outside of the envelope "Must be delivered prior to Midnight, May 9, 1969." The Clerk agreed to do so.

Subsequently, it was learned that the Sixth Circuit Clerk mailed the Record First Class—Registered, contrary to everything that had been discussed in numerous telephone conversations.

Under all of the facts and circumstances Petitioners respectfully submit that the Record be considered constructively received on time. Especially in light of the fact that the Record was at all times in the hands of the federal judiciary, except when enroute being handled by the federal post office system.

Petitioners have an extremely important interest in their cases and desire to be heard. A brief *amicus curiae* is being tendered on the merits.

The Petition should be considered timely filed.

Respectfully submitted,

WILLIAM R. COEN
COEN & WAY
1117 Talbott Tower
Dayton, Ohio 45402

APPENDIX

(Letterhead)

Law Offices of
COEN & WAY
1117 Talbott Tower
Dayton, Ohio 45402

William R. Coen
Robert C. Way
Robert A. Skinner
Robert E. Hunter

Area Code 513
224-1427

May 1, 1969

Mr. Carl W. Reuss, Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati, Ohio 45202

Re: Joseph N. Tooni v. Eugene Zuckert, No. 18,228

Daniel L. Edwards, Jr. v. Eugene Zuckert, No. 18,229

Gentlemen:

This is to confirm my telephone conference with your office this date to the effect that we are filing a Petition for a Writ of Certiorari in the above cases.

Accordingly, we will appreciate it if you will please forward to the United States Supreme Court the original record in both Tooni and Edwards, together with any other papers required by law.

Thank you.

Very truly yours,

COEN & WAY
William R. Coen

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

WILLIAM R. COEN
COEN & WAY
1117 Talbott Tower
Dayton, Ohio 45402
Counsel for Petitioners

August 18, 1969

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
Petitioners,

v.

ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioners respectfully request that this Court grant rehearing of its order dated June 23, 1969, which denied certiorari, and that the Court now grant certiorari.

An extension of time until August 18, 1969, for filing the petition for rehearing was granted by your Court on July 16, 1969.

REASONS FOR GRANTING THIS PETITION FOR REHEARING

Petitioners desire to submit arguments that apply to both cases, and also to submit arguments applicable to the Petitioners separately.

Reasons Applicable To Both Petitioners Petition For Writ of Certiorari Should Be Considered Timely Filed

The order of June 23, 1969 granted leave to District Lodge, 23, International Association of Machinists and

Aerospace Workers for leave to file its brief, as amicus curiae. The order then went on to deny certiorari. It is not possible to determine from this order whether the Court ruled on the petition for certiorari on the merits or not. Petitioners submit that if the petition was denied for procedural reasons, such as the failure of the Record to arrive on time due to the failure of the Clerk of the Sixth Circuit mailing the Record Air Mail—Special Delivery, as requested by counsel for Petitioners, that the Court consider the petition for certiorari timely filed, for the reasons stated in Petitioners Reply Brief previous filed.

It would truly be a miscarriage of justice to deny certiorari to sustain the removal of the Petitioners from the federal service based upon the failure of the Deputy Clerk in the Sixth Circuit to properly mail the Record as requested by counsel. Two wrongs do not make a right, yet unless this petition is granted, Petitioners will be barred from reinstatement to their government positions due to the misfeasance of a Deputy Clerk. Is this justice? We believe the petition has been considered timely filed; but there is no way to determine this from the order of June 23. If the Court did not consider the petition timely filed, we urge that the Court should do so, and grant the petition for certiorari in order that the case may be heard on the merits.

Summary Judgment Improperly Awarded Respondent

Petitioners desire to point out a matter which was apparently not brought to the attention of the Court previously. In the District Court, when the government moved for summary judgment, Petitioners moved for summary judgment, reserving their rights to a trial for determination of factual issues, if summary judgment were not awarded in favor of Petitioners. In other words, Petitioners did not waive their right to a trial of the factual

questions, as outlined on Pages 30 and 31 of the Petition for Certiorari. The cited case of *Weinberg* v. *Macy*, 360 F.2d 816 (CA, D.C. 1965) and *Jenkins* v. *McKeithen*, 89 S.Ct. 1843, June 9, 1969, which has not been cited previously, reflect the established law to the effect that summary judgment must not be used to deprive a litigant of his right to a trial of factual issues. The Court stated in *Jenkins*, at Page 1849 of the Supreme Court Reporter:

> "For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. (Citations omitted.) And, the complaint is to be liberally construed in favor of plaintiff. See Fed. Rule Civ. Proc. 8(f); *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The complaint should not be dismissed unless it appears that appellant could 'prove no set of facts in support of his claim which would entitle him to relief.' *Conley* v. *Gibson*, supra, at 45-46, 78 S.Ct. at 102."

As will be discussed under the Separate Arguments of Petitioners, there are numerous issues of fact which preclude a summary judgment against Petitioners.

SEPARATE ARGUMENT OF JOSEPH N. TOONI

Failure of District Judge To Consider Supplemental Affidavit

Petitioner Tooni has at least two arguments which have not been previously brought to the attention of this Court. Both reasons are extremely important and compel a granting of certiorari in this case.

On June 30, 1967, Petitioner Tooni signed a Supplemental Affidavit, copy attached, which was taken to the District Court almost simultaneously with the issuance of the Decision by Judge Weinman on July 3, 1967. It is not clear whether the Record of the District Court before the

District Judge included this Supplemental Affidavit, which contained vital and important information regarding the withdrawal of certain papers from Mr. Tooni's file. It is the opinion of counsel for the Petitioner, that the District Court did not consider this Supplemental Affidavit, and had the District Court done so, Judge Weinman would have required a trial of the factual issues involved (withdrawal of papers from 201 file).

Failure of District Court To Grant Hearing On Factual Questions

The determination of whether or not Petitioner Tooni's Form 57 was fraudulent must stand or fall upon the Affidavit of said Petitioner attached to his Motion for Summary Judgment. However, the government submitted no affidavit to contradict Petitioners detailed affidavit. Query: How could the District Judge grant summary judgment in favor of the Government, when, the factual matters involved were all sworn to by Petitioner Tooni in his detailed affidavit which explained away every iota of fraud or misrepresentation?

Factual Question Of Whether Or Not Form 57 Was Ever Submitted As Claimed By The Government

Petitioner Tooni desires to point out another argument which has not been presented previously to this Court. Early in the Appeal of Mr. Tooni, a statement was given to a Civil Service Commission investigator. This statement explained that the items contained in the alleged fraudulent Form 57 were, in fact, never made a part of the Form 57 at all. This statement was no doubt relied upon by the Chicago Regional Office of the Civil Service Commission in making its findings that there was no fraudulent Form 57 submitted by Mr. Tooni. Somewhere in the maze

of paper work which has transpired since the Chicago Region's favorable decision, this fact has been obscured. The facts are that Petitioner Tooni was urged by a fellow employee to "add" experience information to his Form 57; that Mr. Tooni had outlined various courses and hours attended, *not denominating the hours as credit hours* and as this information was being assembled, and not made a part of the Form 57 of Petitioner Tooni, one Capt. Carlson removed this information from a typewriter and used it against this Petitioner as items which were part of his Form 57, when, in fact, they were never made a part of the Form 57 by Mr. Tooni.

Petitioner respectfully represents that there have been irregularities in the procedural steps of his case including removing items from his 201 file and the addition of certain items to his Form 57, without his authority, and that the resulting sabotage of his records has now resulted in his removal from the federal service.

As stated in Petitioners Affidavit attached to his Motion for Summary Judgment he "at no time had any intent to defraud or misrepresent anything on his SF-57 . . . that he never intentionally misrepresented any material fact."

Petitioner Tooni states that he has suffered irreparable harm to his reputation by reasons of his removal, and severe damage to his ability to obtain responsible positions, due to credit reports which indicate a removal for fraudulent misrepresentation; that he actually never made these alleged misrepresentations a part of his Form 57, and that his sworn affidavit explaining the hours and credits of various courses has never been disputed.

Accordingly, Mr. Tooni is entitled to a trial for a determination of the facts regarding the above procedural errors and substantive issues which have been resolved against him in an arbitrary and capricious manner.

SEPARATE ARGUMENT FOR PETITIONER DANIEL L. EDWARDS, JR.

Petitioner Edwards desires to bring to the Courts attention the recent case of *Norton* v. *Macy*, USCA DC, No. 21,625, July 1, 1969. This case involved the removal of an alleged homosexual. The Court stated that a finding of immoral or indecent conduct of an employee is not grounds for removal without some ascertainable deleterious effect on the efficiency of the service.

> "Thus, we think the efficiency of the charges against appellant must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do."

Again, the District of Columbia seems to be granting meaningful judicial review of illegal removal of federal employees. This argument was made on Page 13 of the Petition for Certiorari, quoting *Louks* v. *United States*, 395 F.2d 993 (Ct. Cl. 1968) and *Scott* v. *Macy*, 349 F.2d 182 (CCA, D.C. 1965). The *Norton* case was decided after certiorari was denied in this case. The result is untenable. In *Scott* and *Norton*, we have alleged homosexuals being granted judicial relief, but Petitioner Edwards who has borne the brunt of numerous procedural errors is being removed for alleged inefficiency which arose out of this valuable employee's complaint that he had insufficient work to do, and he was tired of watching Bob Hope movies.

Petitioner Edwards desires to bring to the Court attention the argument of the brief amicus curiae filed herein regarding the separation of powers doctrine. In the case of *Adam Clayton Powell, Jr.* v. *McCormack*, 89 S.Ct. 1944 (June 16, 1969) this Court determined that it should set aside the action of the Congress of the United States and its resolution excluding member-elect Powell from the House of Representatives. True, there are diverse issues,

but there are also similar issues involving the separation of powers. Judicial review was afforded the legislative action in *Powell.* The Court stated at Page 1955 of the Supreme Court Reporter:

> "That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision."

Is not the Executive Branch of the Government also subject to judicial review?

Petitioner submits that he is entitled to the same strength and protection of the separation of power doctrine as Adam Clayton Powell. Petitioner submits that the argument of the brief amicus curiae is now expressly applicable in light of the *Powell* decision.

Petitioner Edwards would stand on top of the Capitol Building in Washington, or on top of the Washington Monument, or in the court room of this Court, if he were only given the opportunity to show the numerous procedural errors which entitle him to reinstatement to his job, or at least a trial to determine the factual issues involved.

Petitioner Edwards' Amended Motion for Summary Judgment in the District Court, was in the alternative, Petitioner requesting a trial, if summary judgment was not awarded in his favor. The District Court states in its brief decision that certain facts were not denied by Plaintiff, and that the required procedural steps were followed in his removal. Petitioner Edwards submits that this finding by the District Judge constitutes *reversible error.* Said Petitioner submitted to the District Judge a nine (9) page memorandum explaining the true chronology of the events and listing numerous procedural violations by the Air Force of its own regulations. See *Service* v. *Dulles,* 354 U.S. 363 (1957), which held:

> "Petitioner's discharge was invalid, because it violated Regulations of the Department of State which were binding on the Secretary; and the judgment is reversed."

Said Petitioner's Motion for Summary Judgment together with his amended complaint preclude a finding that the alleged procedural steps were following in the removal action. Petitioner Edwards tried to bring these to the attention of this Court in his Separate Argument in the Petition for Certiorari, Pages 19-30.

These procedural violations were never explained away by the Government, for, in fact, the violations which did occur were violations of the Air Force regulations. Judicial review was awarded in *Camero* v. *United States*, 375 F.2d 777 (Ct. Cl. 1967). Certainly, at the very least, Petitioner is entitled to a trial of the factual issues. *Weinberg* v. *Macy*, 360 F.2d 816 (CA, D.C. 1965).

What must this Petitioner do to spell out any more clearly the numerous patent procedural violations, in order for this Court to grant certiorari? It is so obvious that this case is on all fours with the rule of law set forth in *Service* v. *Dulles*, supra, that it defies further argument or explanation.

Petitioner Edwards respectfully submits that the following procedural violations are, ipso facto, reason in and of themselves to entitle him to a trial of the factual issues involved:

> Denial of Veterans Right to Answer Personally; Nonexistent Regulation Admittedly quoted in Letter of Proposed Removal. Repeated failure of Air Force to grant Grievance Hearings as provided by their own Regulations. Failure of Air Force to provide witnesses as provided in their own Regulations.

In the opinion of counsel for Petitioner, there is no question but any one of these procedural errors should compel

the reversal of the lower Court. The fact that all of these errors and violations occurred in one case has caused Petitioner Edwards to lose his job illegally. There is no question about this. THE AIR FORCE VIOLATED ITS OWN REGULATIONS. The lower Court must be reversed upon the authority of *Service* v. *Dulles*, supra.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

WILLIAM R. COEN